THE RAPID ACT; THE SUNSHINE FOR REGULATORY DECREES AND SETTLEMENTS ACT OF 2015; AND THE SCRUB ACT OF 2015

HEARING

BEFORE THE

SUBCOMMITTEE ON
REGULATORY REFORM,
COMMERCIAL AND ANTITRUST LAW

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTEENTH CONGRESS

FIRST SESSION

ON

H.R. 348, H.R. 712, and H.R. 1155

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MARCH 2, 2015

THE RAPID ACT; THE SUNSHINE FOR REGULATORY DECREES AND SETTLEMENTS ACT OF 2015; AND THE SCRUB ACT OF 2015

MONDAY, MARCH 2, 2015

HOUSE OF REPRESENTATIVES,

SUBCOMMITTEE ON REGULATORY REFORM,
COMMERCIAL AND ANTITRUST LAW

COMMITTEE ON THE JUDICIARY,

Washington, DC.

The Subcommittee met, pursuant to call, at 4:01 p.m., in room 2141, Rayburn House Office Building, the Honorable Tom Marino (Chairman of the Subcommittee) presiding.

Present: Representatives Marino, Goodlatte, Issa, Collins, Ratcliffe, Trott, Bishop, Johnson, Conyers and Peters.

Staff Present: (Majority) Daniel Flores, Subcommittee Chief Counsel; Andrea Lindsey, Clerk; and (Minority) Slade Bond, Counsel.

Mr. MARINO. Good afternoon. I want to thank you for being here, and the Subcommittee on Regulatory Reform, Commercial and Antitrust Law will come to order.

Without objection, the Chair's authorized to declare recesses of the Committee at any time.

We welcome everyone to today's hearing on H.R. 348, the "Responsibly And Professionally Invigorating Development Act of 2015," also known as the "RAPID Act," H.R. 712, the "Sunshine for Regulatory Decrees and Settlements Act of 2015," and H.R. 1155, the "Searching for and Cutting Regulations that are Unnecessarily Burdensome (SCRUB) Act of 2015."

I will recognize myself for my opening statement. The American historical record has always been, "the worse the recession, the stronger the recovery." Regrettably for many Americans I think we can all agree the recovery from the recession has been anything but strong. According to the Federal Reserve Bank of Minneapolis in the 10 previous recessions since the depression, the economy recovered all jobs lost during the recession after an average of 25 months from the prior jobs peek.

Under the current Administration however, it took until June 2014, 78 months after the prior jobs peek or 6 and a half years later for even The New York Times to claim we had recovered all of the recession's job losses. Besides losing paychecks, many of Americans have lost the dignity and satisfaction that comes from

earning a living and supporting a family with a full time job. No government benefit can compensate a person for that.

Americans are ready to work. Employers are eager to create jobs, if only the government could just get out of the way. As we will hear from the witnesses today the job opportunities are here on U.S. soil. A study of proposed projects in just one sector of the economy, the energy sector found that if a modest number of these projects were allowed to go forward and break ground and the direct and indirect economic benefits would be tremendous. It identified 351 projects if approved to generate $1.1 trillion and create 1.9 million jobs annually.

The U.S. Chamber of Commerce's study, Project No Project, looked at the potential economic impact of permitting challenges faced by U.S. companies attempting to propose new energy projects. For example, Penn-Mar Ethanol attempted to construct an ethanol reducing plant in Conoy Township Pennsylvania, but neighboring Hellam Township sent a letter to—excuse me, Conoy Township's board of supervisors objecting to the ethanol plan. Hellam Townships objections included environmental risks to the surrounding area and a risk of causing the beautiful area surrounding the Susquehanna River to become an undesirable site. Is that when we mean when we talk about negative environmental impact and obstructed scenic view? Certainly job creators can't be effective in creating jobs until such an over expansive extreme regime.

After hearing about the numerous projects currently awaiting approval, many of us might be asking ourselves if the workers are here, and the jobs are here, then what's keeping workers idle? Well, I will tell you, it is our outdated, burdensome, convoluted, Federal permitting process that has become a hotbed for the environmental extremists looking to hold up infrastructure of building and growth that our country so desperately needs.

Today there is no limit to the objections various agencies can raise. Environmental reviews not uncommonly take up to a decade or more holding jobs hostage in the process. Antigrowth, antipermitting advocates meanwhile can lie in the weeds for another 6 years once a permit is finally granted, before ambushing good faith project developers with dilatory job and project killing litigation.

Instead of empowering businesses to be the engine of our economy, we instead tie them up with thousands of pages of decisions in interminable administrative and litigation delays. This is incomprehensible to anyone but a specialist, a costly legal team or a so-called advocacy group that seeks to kill economic activity and the jobs in growth for hardworking Americans that come with it.

I introduced the RAPID Act to right the ship, restore balance and impose sanity on our Federal permitting system. My esteemed colleague Mr. Collins from Georgia and Mr. Smith from Missouri similarly introduced the Sunshine for Regulatory Decrees and Settlements Act and the SCRUB Act to achieve the same thing in litigation that seeks to force new regulations in an effort to clear from the code of Federal regulations overburdensome regulations we no longer need.

The key to these reforms is balance, and each of these reforms has that. My RAPID Act strikes the right balance between conservation, and deployment, and development.

The Sunshine for Regulatory Decrees and Settlement Act strikes the right balance between respect for plaintiffs and defendant's right and regulatory litigation in fairness to regulate entities in State coregulators that must bear the burden of living under and implementing new regulations.

And the SCRUB Act strikes the right balance between keeping regulations we still need in scrubbing from the books regulations that are unnecessary obstacles to jobs and growth. I thank our witnesses for attending and sharing their valuable expertise with us and look forward to their testimony.

It is my pleasure now to recognize the gentleman from Georgia, the Ranking Member of the Subcommittee on Regulatory Reform, Commercial and Antitrust Law, Congressman Johnson.

Mr. JOHNSON. Thank you, Mr. Chairman.

In 1981 a professor of law at the University of Chicago described the difference between the parties as quite simple, while cautioning Republicans against the fervent pursuit of regulatory reform stating, Democrats want to run the country and Republicans don't want them to. Republicans seem delighted in the prospect of legislation that will make change more difficult. Where government action is needed by the private sector as it is for the licensing of new nuclear plants, the procedural safeguards and judicial review protections so carefully nurtured in other contexts by the corporate bar have proven to be a Frankenstein, affording licensing opponents, unlimited opportunities to impose costly delays.

The professor concluded that regulatory reform measures do not deter regulation, they deter change no matter the cost of inaction. That professor would go on to become an Associate Justice of the United States Supreme Court and his name, none other than Antonin Scalia. It is indeed rare for me to quote Justice Scalia in any context, let alone with approval, but I'm struck by the prescience of the Justice over 3 decades ago in describing the shortsighted nature of proponents of regulatory reform.

During today's hearing this Subcommittee will consider three pieces of legislation that do absolutely nothing to protect the public interest, grow the economy or create jobs. The only connection between these bills is their bold corporatism. H.R. 348, the so-called Responsibly and Professionally Invigorating Development Act of 2015 will result in widespread confusion and delay in the review and permitting process under the National Environmental Policy Act by carving out a separate environmental review process for construction projects, which the bill doesn't even define. And if an agency fails to meet the unrealistic deadlines mandated by H.R. 348, the bill would automatically green light a project regardless of whether the agency has thoroughly reviewed the project's risks.

This legislation is a solution feverishly in search of a problem. The nonpartisan Congressional Research Service reported in 2012 that project approval delays based on environmental requirements are not caused by NEPA, but are more often tied to local, State and project specific factors, primarily local state agency priorities,

project funding levels, local opposition to a project, project complexity or late changes in project scope.

I also have serious concerns with H.R. 712, the "Sunshine for Regulatory Decrees and Settlements Act of 2015." Consent decrees and settlement agreements help ensure that agencies take necessary action by a certain date. The Government Accountability Office also reported in December of 2014 that there is zero evidence indicating that agencies collude with public interest groups in bringing these consent decrees that the Chamber has often claimed.

H.R. 712 would allow for nearly any private party to intervene in a consent decree revealing the legislation's true purpose of stacking the deck in industry's favor to avoid the enforcement of the law.

Lastly, H.R. 1155, the "SCRUB Act" is a one-way ratchet with the sole aim of prioritizing cost over benefits through the reckless elimination of rules without consideration of their benefits. This legislation would shift the cost of rules from corporations to consumers while posing substantial burdens and delays to agencies undermining public health and safety. It is indeed an act that should be scrubbed.

In closing, I strongly oppose each of these deregulatory train wrecks that comprise the subject of today's hearing.

And I yield back.

Mr. MARINO. Thank you, Mr. Johnson.

It is now my pleasure to recognize the Chairman of the full Judiciary Committee, the gentleman from Virginia, Chairman Bob Goodlatte.

Mr. GOODLATTE. Thank you, Mr. Chairman.

America's voters sent the 114th Congress to Washington to do one thing above all other others, help turn around this Nation's struggling economy. From the outset of the term, the Judiciary Committee has responded to that mandate with urgently needed reforms of Washington's regulatory system. A system that virtually every day places new obstacles in the path of American jobs and economic growth.

Already the House has passed two critical Judiciary Committee regulatory reform bills. The Regulatory Accountability Act to force regulators to account for and control far better the excessive cost of new regulations and the Small Business Regulatory Flexibility Improvements Act to force regulators finally to accommodate better the needs of small businesses when they issue new regulations.

Today's hearing considers three more integral parts of the Judiciary Committee's regulatory reform package, the RAPID Act, the Sunshine for Regulatory Decrees and Settlements Act and the Searching for and Cutting Regulations That Are Unnecessarily Burdensome or SCRUB Act.

The RAPID Act contains common sense reform to streamline permitting for Federally funded and Federally permitted construction projects. It gives lead agencies more power to conduct and conclude efficient interagency reviews of permit requests and requires lawsuits that challenge permitting decisions to be filed within 6 months of the decisions. These are simple but powerful reforms that will allow good projects to move forward more quickly delivering high quality jobs and improvements to American daily lives.

The Sunshine for Regulatory Decrees and Settlements Act curbs the abuse of sue and settle consent decrees and settlement agreements to force through new regulations under judicial authority without adequate consideration of the views of those who are regulated and of the States who so often must shoulder the hard work of implementing Federal regulatory decisions.

Finally, the SCRUB Act institutes a blue ribbon commission to help identify and eliminate costly regulations that can safely be removed from the code of regulations. These include, for example, regulations that have achieved their purpose and are no longer truly needed, imposed paperwork burdens that can be reduced substantially without significantly undercutting regulatory effectiveness or impede the new introduction of new, safer and more efficient technologies.

Opponents of these bills contend that there are no problems with regulations or that these bills overreact to the problems and would bring needed regulatory actions to a halt. The American people know better. In the middle of it this winter's historic cold, ask any worker displaced by a new ideologically driven power plant regulation how warm they are as they continue in vain to look for a new job.

Ask any farmer who fears that the Environmental Protection Agency's new Waters of the United States rule will place Federal permitting shackles on the use of their property because once in a while there is a puddle in a middle of field.

Ask municipality and manufacturers across the country that will not be able to grow because of the EPA's new ozone rule, the most costly single regulation ever issued. Like each bill in the Judiciary Committee's regulatory reform package, each of these bills contains well thought out balanced reforms. They allow needed regulatory actions to take place but provide for more transparency, more public input and more accountability in the regulatory process. They also provide for more efficient decisionmaking and more effective tools to prevent or remove from the books regulatory actions that are not needed, are ill-considered or are the overreaching fruits of back door sweetheart negotiations between regulators and pro regulatory advocates.

I urge my colleagues to consider well and support these important pieces of legislation. I look forward to the testimony of our witnesses.

And I yield back, thank you, Mr. Chairman.

Mr. MARINO. Thank you, Chairman.

It is new my pleasure to recognize the Judiciary Committee Ranking Member, Mr. Conyers of Michigan for his opening statement.

Mr. CONYERS. Thank you.

We seem to have on the Committee very differing views of what we're going to be talking about today, I suppose the witnesses have picked up on that already.

I'd like to describe what I think are three thoroughly flawed bills, and I begin with H.R. 348 the misleadingly titled "Responsibly And Professionally Invigorating Development Act of 2015." Rather than making real reforms to the process which Federal agencies undertake environmental impact reviews as required by the National En-

vironmental Policy Act, this legislation will make this process less responsible, less professional and less accountable.

I think that will come out during the course of our discussion between us today. But worse yet this measure could jeopardize public health and safety by prioritizing speed over meaningful analysis. Under the guise of streamlining the approval process, the bill forecloses potentially critical input from various stakeholders, including Federal, State and local agencies for construction projects that are Federally funded or that require Federal approval.

Disturbingly, this measure could even allow such projects to be approved before the required review is completed. As a result, H.R. 348 could allow projects to proceed that put public health and safety at risk. These failings along with many others explain why the Administration and the President's Council on Environmental Quality, along with 25 respected environmental groups, including the Audubon Society, the League of Conservation Voters, Natural Resources Defense Council and the Sierra Club strenuously oppose similar legislation considered in the last Congress.

The next bill, H.R. 712, the "Sunshine for Regulatory Decrees and Settlements Act of 2015," has a simple goal, to greatly discourage the use of settlement agreements and consent decrees by Federal agencies when they fail to meet their regulatory obligations as mandated by Congress.

Why is this bill problematic? Well, here are a few reasons, as with the prior bill, H.R. 712 would effectively delay the implementation of regulatory protections, thereby jeopardizing public health and safety. For example, the bill gives opponents of regulation multiple opportunities to stifle rulemaking by allowing essentially any third party who is affected by the regulatory action at issue in a covered civil action to intervene in that civil action subject to rebuttal, to participate in settlement negotiations, and to submit public comments about a proposed consent decree or settlement agreement that agencies would be required to respond to before such decree or agreement can be entered in court.

Remember, Federal agencies are often sued for their failure to meet their statutory obligations, including missing rulemaking deadlines. Consent decrees and settlement agreements help to enforce the statutory mandates and assure that these agencies meet their obligations by a date certain. But, H.R. 712 would needlessly impede this enforcement process by imposing an extensive series of burdensome requirements on agencies seeking to enter into consent decrees or settlement agreements.

A broad coalition of civil rights, environmental consumer protection, and other public interest groups opposed a substantially similar bill considered in the 112th and the 113th Congresses. These organizations include the Alliance for Justice, the American Association for Justice, the Center for Food Safety, the Defenders of Wildlife, Earth Justice, the Natural Resources Defense Council and the Center for Effective Government and Public Citizen. Additionally, the Administration threatened to veto H.R. 712's predecessor from the 112th Congress, stating that it would spawn excessive regulatory litigation and introduce redundant processes for litigation settlements.

And finally, we have H.R. 1155, the "Searching for and Cutting Regulations that are Unnecessarily Burdensome Act of 2015" or for short the "SCRUB Act." Most observers would agree in principle that retrospective review of existing regulations is a good idea. Agencies should periodically assess whether the rules they have promulgated are as effective as they can be or whether they are even necessary in light of changed circumstances. Unfortunately, the SCRUB Act would not simply require retrospective review, instead it is yet another attempt to hobble the ability of agencies to regulate and thereby prevent them from protecting public health and safety based on unsubstantiated rhetoric that regulations inhibit economic growth.

As a threshold matter, the central feature of the bill is the establishment of a commission to identify rules that should be eliminated. The commission would effectively be able to second guess the judgments of Congress and the agencies with respect to the need for certain rules and the science and analysis warranting such rule.

The bill reflects a blatantly one sized, unbalanced approach to retrospective review. For example, virtually all of the bills objectives and mechanisms are one-way ratchet. The measure is designed to result in the repeal or amendment of a rule only to eliminate or reduce costs regardless of the rules benefits. Tellingly, H.R. 1155 does absolutely nothing to promote actions that would enhance the benefits of rules.

In closing these measures threaten critical public health and safety protections. It's a shame that the majority has chosen to largely ignore the concerns of my colleagues and I have previously identified with these bills.

I thank the witnesses for appearing today and look forward to their testimony.

Mr. MARINO. Thank you, Mr. Conyers.

Without objection, other Members opening statements will be made part of the record.

We have a very distinguished panel before us today.

And I will begin by swearing in our witnesses before introducing them.

If you would please rise and raise your right hand.

Do you swear that the testimony you are about to give is the truth, the whole truth, and nothing but the truth, so help you God?

Please let the record reflect that all the witnesses have responded in the affirmative, and you may be seated, gentlemen.

Our first witness is Mr. William Kovacs. Mr. Kovacs provides the overall direction, strategy and management for the environment, technology and regulatory affairs division as senior vice president of the division at the U.S. Chamber of Commerce. Since he joined the Chamber in March 1998, Mr. Kovacs has transformed a small division, concentrated on a handful of issues in Committee meetings into one of most significant in the organization. His division initiates and leads campaign issue campaigns on energy, legislation, complex environmental rulemaking, telecommunications reform, emerging technologies and applying sound science to the Federal regulatory process.

Mr. Kovacs previously served as chief counsel and staff director for the House Subcommittee on Transportation and Commerce. He earned his J.D. from the Ohio State University College of Law and a Bachelor's degree of science degree from the University of Scranton magna cum laude.

Welcome, sir.

Mr. KOVACS. Thank you, Mr. Chairman.

Mr. MARINO. Sir, I'm going to introduce everybody and then we will come back, do it that way.

Our second witness is Mr. Sam Batkins. Mr. Batkins is director of regulatory policy at the American Action Forum. Mr. Batkins research focuses on the rulemaking efforts of administrative agencies and related efforts of Congress. His work has appeared in The Wall Street Journal, The New York Times, the Hill, National Review Online, Reuters, the Washington Post among other publications.

Prior to joining the Forum, Mr. Batkins worked at the U.S. Chamber of Commerce Institute for Legal Reform and National Taxpayers Union. At the U.S. Chamber he focused on lawsuit abuse, tort reform and Federal regulations. At the National Taxpayers Union he focused on State and Federal spending. Mr. Batkins received his B.A. in political science summa cum laude from Sewanee, University of the South. He received his J.D. from Catholic University of America, Columbus School of Law. Welcome, sir.

Our next witness is Dr. Patrick McLaughlin. Am I pronouncing that correctly?

Mr. MCLAUGHLIN. Yes.

Mr. MARINO. Dr. McLaughlin is senior research fellow at the Mercatus Center for George Mason University. His research focuses on regulation and the regulatory process with additional interest in environmental economics, international trade, industrial organization, and transportation economics. And his research is regularly published.

Prior to joining Mercatus, Dr. McLaughlin served as a senior economist at the Federal railway administration in the United States Department of Transportation. Dr. McLaughlin has published in the fields of law and economics, public choice environmental economics and international trade. He owns a Ph.D. in economics from Clemson University, and welcome to you, sir.

And our final witness is Mr. Amit Narang.

Mr. NARANG. Very good.

Mr. MARINO. Good. Mr. Narang is the regulatory policy advocate for Public Citizen and specializes on issues related to the Federal regulatory process. Prior to working for Public Citizen, Mr. Narang worked at the Administrative Law Review as an articles editor.

Mr. Narang has many media appearances, including quotes in The New York Times and Bloomberg BNA, formerly the Bureau of National Affairs, Mr. Narang is a graduate of the American University, Washington College of Law. And thank you, sir.

Each of the witnesses' testimonies or written statements will be entered into the record in its entirety. I ask that each witness summarize his testimony in 5 minutes or less. And to help you stay within that time, there is a timing light in front of you. The light

will switch from green to yellow, indicating that you 1 minute to conclude your testimony.

And when the light turns red it indicates that your 5 minutes have expired. And if you go over that a little bit, that's not a real problem, I'll just tap to give you an indication that perhaps you could wrap up for us.

With that, I'm going to call on Mr. Kovacs for his opening statement.

TESTIMONY OF WILLIAM L. KOVACS, SENIOR VICE PRESIDENT, ENVIRONMENT, TECHNOLOGY & REGULATORY AFFAIRS, U.S. CHAMBER OF COMMERCE

Mr. KOVACS. Thank you, Chairman Marino and Ranking Member Johnson and Members of the Committee for inviting me here today to testify on H.R. 348, currently known as RAPID, which addresses permit streamlining, and H.R. 712, which we refer to as the Sunshine Act, and that would bring transparency to the sue and settle process which enables interest groups to set agency priorities.

When we discuss regulatory reform it is usually about Federal agency accountability, transparency, public participation and efficiency, but one of the points that we've been making lately is regulatory reform is also about Article I of the Constitution and Congress' ability to hold agencies accountable for the intent of Congress.

The primary goal of RAPID is to bring good management practices, and I repeat that just good management practices, to the process of issuing infrastructure permits by requiring Federal agencies to do a few simple things. One, designate a lead agency to coordinate and manage the environmental review process within specified time frames. Two, manage Federal and State environmental reviews concurrently rather than sequentially. And three, establish a 6-month statute of limitations for bringing suit against the project, a time period Congress has similarly set for legal challenges in Federal construction projects and water construction projects.

Passage of RAPID is essential if this Nation is to foster job creation. RAPID does not and I want to repeat this, does not mandate that any particular project be built, but it does require Federal agencies to provide the developer with a decision within a fixed period of time. Moreover, when RAPID was deployed in transportation construction projects in SAFETEA-LU, it cut the time to complete a NEPA statement from 73 months to 37 months. The concept of permit streamlining has been supported in various amendments in the House and the Senate by the Administration and by Senators as diverse as Boxer and Barrasso and governors across the Nation. This is a bipartisan issue that this Congress should be capable of enacting.

Turning now to H.R. 712, the Sunshine Act, this addresses the issue of sue and settle, a situation which occurs when an agency agrees to the demands of an interest group by voluntarily entering into a court approved consent decree. The process has resulted in over 100 regulations being issued in the last 5 years, many of them imposing costs over a $1 billion per regulation.

The Sunshine Act and I am going to use the word merely again, the Sunshine Act, merely requires that an agency seek public comment from the public prior to the filing of a consent decree and provide the comments to the court.

Second, it allows interested parties to seek to intervene if they can establish that their rights are not being adequately protected.

The Chambers' interest in these issues grew out of the fact that the regulations were being imposed both on States and our members as a result of settlements that they had no knowledge of. We discovered that neither EPA nor the Department of Justice even maintained a database of such lawsuits but we were assured there were very few. We therefore undertook the research that culminated with a very extensive inventory of sue and settle amendments and it lists well over 100 new regulations that have resulted in the last 6 years from sue and settle agreements.

Bringing a management process to the issuance of permits, a management process, none of the substances changed. And bringing transparency to the filing of consent decrees that are going to bind the agency for years can only describe as good government, I'm sure I'll have some questions on it. Thank you very much.

Mr. MARINO. Thank you, sir.

[The prepared statement of Mr. Kovacs follows:]

Statement of the U.S. Chamber of Commerce

ON: **Hearing on H.R. 348, the "Responsibly And Professionally Invigorating Development Act of 2015" (RAPID Act); H.R. 712, the "Sunshine for Regulatory Decrees and Settlements Act of 2015"; and the "Searching for and Cutting Regulations that are Unnecessarily Burdensome Act of 2015" (SCRUB Act)**

TO: **U.S. House of Representatives Committee on the Judiciary Subcommittee on Regulatory Reform, Commercial and Antitrust Law**

DATE: **March 2, 2015**

BY: **William L. Kovacs, Senior Vice President, Environment, Technology & Regulatory Affairs**

1615 H Street NW | Washington, DC | 20062

The U.S. Chamber of Commerce is the world's largest business federation representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations. The Chamber is dedicated to promoting, protecting, and defending America's free enterprise system.

More than 96% of Chamber member companies have fewer than 100 employees, and many of the nation's largest companies are also active members. We are therefore cognizant not only of the challenges facing smaller businesses, but also those facing the business community at large.

Besides representing a cross-section of the American business community with respect to the number of employees, major classifications of American business—e.g., manufacturing, retailing, services, construction, wholesalers, and finance—are represented. The Chamber has membership in all 50 states.

The Chamber's international reach is substantial as well. We believe that global interdependence provides opportunities, not threats. In addition to the American Chambers of Commerce abroad, an increasing number of our members engage in the export and import of both goods and services and have ongoing investment activities. The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

Positions on issues are developed by Chamber members serving on committees, subcommittees, councils, and task forces. Nearly 1,900 businesspeople participate in this process.

BEFORE THE COMMITTEE ON THE JUDICIARY OF THE U.S. HOUSE OF REPRESENTATIVES, SUBCOMMITTEE ON REGULATORY REFORM, COMMERICAL AND ANTITRUST LAW

Hearing on H.R. 348, the "Responsibly And Professionally Invigorating Development Act of 2015" (RAPID Act); H.R. 712, the "Sunshine for Regulatory Decrees and Settlements Act of 2015"; and the "Searching for and Cutting Regulations that are Unnecessarily Burdensome Act of 2015" (SCRUB Act)

Testimony of William L. Kovacs
Senior Vice President, Environment, Technology & Regulatory Affairs
U.S. Chamber of Commerce

March 2, 2015

Good afternoon, Chairman Marino, Ranking Member Johnson, and distinguished Members of the Subcommittee. My name is William L. Kovacs and I am senior vice president for Environment, Technology and Regulatory Affairs at the U.S. Chamber of Commerce. My statement details the Chamber's strong support for two regulatory reform bills now pending before this Subcommittee, H.R. 348, the "Responsibly and Professionally Reinvigorating Development (RAPID) Act of 2015," and H.R. 712, the "Sunshine for Regulatory Decrees and Settlements Act of 2015." These two bills embody many of the U.S. Chamber's highest regulatory reform priorities in the 114th Congress. Accordingly, we urge this Subcommittee to send this critical legislation to the House floor.

The U.S. Chamber's Regulatory Reform Agenda

On December 2, 2014, U.S. Chamber of Commerce President and CEO Thomas J. Donohue articulated the urgent need to fix the U.S. regulatory system. He identified four key principles to accomplish real regulatory reform and lead to greater growth, more jobs, and better government. Those principles are:

- **Restore federal agency accountability to the public and Congress.**
- **Ensure greater transparency by agencies in their decision making process and their actions.**
- **Allow improved, meaningful participation by stakeholders.**
- **Guarantee that the federal process to permit major new projects a safe but swift.**

The Chamber specifically supports H.R. 348 and H.R. 712, along with H.R. 185, the "Regulatory Accountability Act of 2015"—which already passed the House on a bipartisan vote—as vehicles to turn these principles into reality. By bringing more predictability and efficiency to the project permitting process and requiring agencies to be

transparent and disclose the sue-and-settle agreements they wish to enter into, these bills address the compelling need to reform the regulatory process itself. These reforms are not intended to steer the regulatory process to specific outcomes, but to ensure that the process is transparent, fair to all, meets the test of common sense, and is compatible with our principles of economic freedom and our strong desire to create good jobs and growth.

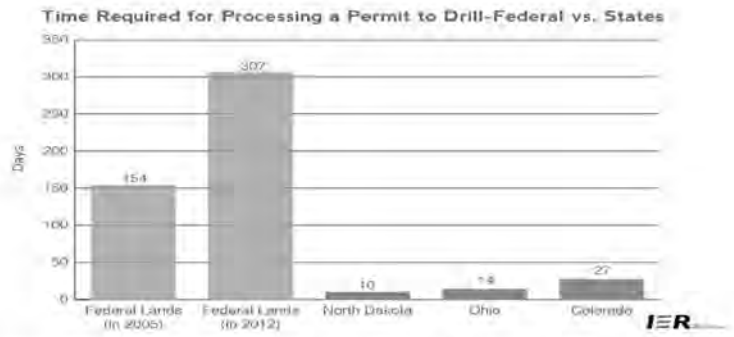
I. H.R. 348, THE "RESPONSIBLY AND PROFESSIONALLY REINVIGORATING DEVELOPMENT (RAPID) ACT OF 2015"

One of the most significant problems plaguing our current regulatory process is the Byzantine maze of approvals and legal challenges that must be navigated before a major development project can be permitted. The RAPID Act is designed to address that problem by, among other things: (1) designating a lead agency that is responsible for managing and coordinating the review process among agencies, and (2) placing time limits on decision making and legal challenges for infrastructure projects without changing the substantive requirements that protect the public.

A. Defining the Problem

The Hoover Dam was built in five years. The Empire State Building took one year and 45 days. The Pentagon, one of the world's largest office buildings, took less than a year and a half. The New Jersey Turnpike needed only four years from inception to completion. Fast forward to 2015, and the results are much different. By contrast, the Cape Wind project has needed over a decade to obtain the necessary permits to build an offshore wind farm. After obtaining federal leases in 2005, it took Shell Corporation seven years to obtain oil and gas exploration permits for the Beaufort Sea. And the Port of Savannah, Georgia spent thirteen years reviewing a potential dredging project.

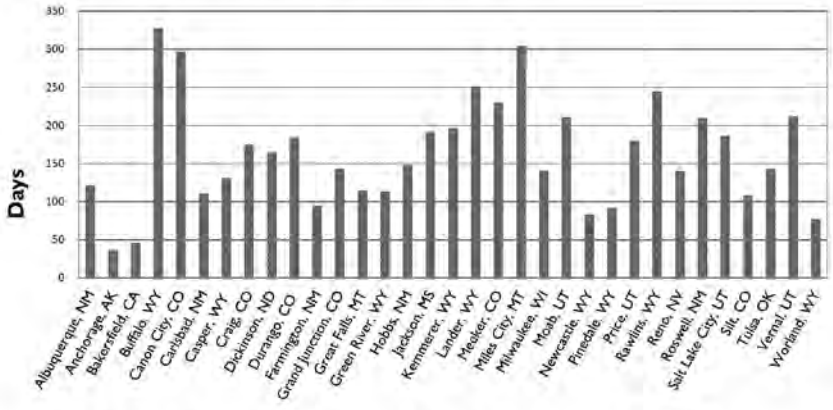
These are not outlier projects – these projects represent the "rule" and not the "exceptions" when it comes to our federal environmental review and permitting process. According to an April 2014 report issued by the U.S. Government Accountability Office (GAO), when there is information available on review times under the National Environmental Policy Act (NEPA), the process is a slow one with the average preparation time for the environmental impact statements (EISs) finalized in 2012 running 4.6 years. This is the highest average since 1997. Similarly, at a February 5, 2013 hearing before the House Subcommittee on Energy and Power, a representative from the Institute for Energy Research testified that it currently takes more than 300 days to process a permit to drill for oil and gas on federal lands onshore. As shown in the chart below, this is in sharp contrast to the time it takes to process a permit for the same drilling activities on private and state lands – less than one month.



In a June 2014 report, the Office of Inspector General of the U.S. Department of Interior reached similar conclusions to IER on the problems with the federal onshore oil and gas permitting process.[1] The DOI's IG concluded that "[i]n assessing the effectiveness and efficiency of the drilling permit process for oil and gas wells … the Bureau of Land Management (BLM) approves thousands of permits each year, but review times are very long."[2] According to the report findings, BLM reported an average of 228 calendar days, or about 7.5 months, to process an application for a permit to drill (APDs) during 2012. The graph below shows the average processing days for APDs in BLM's 33 field offices.[3]

[1] *Available at* http://www.doi.gov/oig/reports/upload/CR-EV-MOA-0003-2013Public.pdf
[2] *Id.* at 1.
[3] *Id.* at 19.

Appendix 2: APD Average Processing Days



Oil and gas production on federal and tribal lands has averaged $3 billion in annual royalty revenues since 2011. Despite this significant revenue (and the potential for even more), the DOI's IG identified the following problems plaguing the permitting process: (1) neither BLM nor the operators applying for the permits can predict when the permits will be approved; (2) "review(s) may continue indefinitely" because target dates for completing permit applications are neither set nor enforced; (3) "the process at most field offices does not have sufficient supervision to ensure timely completion; and (4) BLM does not have a "results-oriented performance goal" to tackle processing times.[4]

The major cause of these delays in federal permitting is the mandate to conduct environmental reviews of major projects under section 102 of the National Environmental Policy Act of 1969 (NEPA). When federal agencies undertake major actions (including issuing permits), they must evaluate the environmental impacts of the action, along with potential alternatives, unavoidable effects, impacts on long-term productivity, and resource commitments for all covered projects.[5] When NEPA was enacted some forty-six years ago, regulatory agencies routinely ignored environmental considerations when they wrote rules or undertook projects. NEPA was designed to force federal agencies to consider the environmental consequences of their actions. Congress emphatically did **not** intend the consideration of environmental impacts to curtail or significantly delay federal action. In the conference report, the conferees expressed the clear expectation that the NEPA review process would impose only a minor delay on federal agency action. Specifically, they stated:

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[4] *Id.* at 1.
[5] 42 U.S.C. § 4332.

> The conferees do not intend that the requirements for comment by other agencies should unreasonably delay the processing of Federal proposals and anticipate that the President will promptly prepare and establish by Executive order a list of those agencies which have "jurisdiction by law" or "special expertise" in various environmental matters.
>
> The conferees believe that in most cases the requirement for State and local review may be satisfied by notice of proposed action in the Federal Register and by providing supplementary information upon the request of the State and local agencies. (To prevent undue delay in the processing of Federal proposals, the conferees recommend that the President establish a time limitation for the receipt of comments from Federal, State, and local agencies similar to the 90-day review period presently established for comment upon certain Federal proposals.)[6]

NEPA's framers clearly intended that the new law would chiefly be administered and enforced efficiently by the federal agencies themselves, with substantial oversight from the White House Office of Management and Budget (OMB). CEQ believed in 1981 that federal agencies should be able to complete most EISs in 12 months or less.[7] Moreover, the framers also assumed that agencies would be afforded broad discretion in determining how to implement the law, and an agency's NEPA decisions would not be second-guessed by a court. Supporting this key point is the fact that NEPA does not explicitly provide a right of judicial review, and the legislative history of the statute is silent on the right of private action to enforce NEPA. Moreover, in 1970 the judicial standing requirements for third parties who did not participate in an agency action (i.e., neither the project applicant nor the agency) were sufficiently stringent to preclude most environmental group plaintiffs.

Congress remained largely on the sidelines while the courts assumed the task of interpreting and expanding the scope of NEPA in the 1970s. As the amount of time required for agency approvals of actions began to grow longer and longer due to lawsuits, it became clear that NEPA challenges had become a serious obstacle to all development projects.

The result of NEPA's dramatic expansion is a system so bogged-down by administrative procedure and litigation that it is gridlocked.[8] Although this result was not intended by Congress, NEPA's modest review requirements were transformed into an all-consuming super-mandate that overwhelms large-scale projects.

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[6] *Id.* at 8-9 (emphasis added).

[7] Council on Environmental Quality, "NEPA's Forty Most Asked Questions," 46 Fed. Reg. 55 at 18026-18038 (1981).

[8] The near-certainty that a project's permits will be litigated caused one company, Shell, to actually *file a lawsuit against its own project* so that it didn't have to wait until the last day of the statute of limitations for its opponents to file suit. *See* http://www.alaskajournal.com/Alaska-Journal-of-Commerce/AJOC-February-26-2012/Shell-files-pre-emptive-strike-seeks-approval-of-process-on-spill-plan/.

In December 2008, Piet and Carole A. deWitt performed what appears to be the only true quantitative analysis of the time required to complete an EIS.[9] Through an exhaustive *Federal Register* search, they found that between January 1, 1998 and December 31, 2006, 53 federal executive branch entities made available to the public 2,236 final EIS documents; the time to prepare an EIS during this time ranged from 51 days to 6,708 days (18.4 years).[10] The average time for all federal entities was 3.4 years, but most of the shorter EIS documents occurred in the earlier years of the analysis; EIS completion time increased by 37 days each year.[11] The U.S. Forest Service, Federal Highway Administration, and Army Corps of Engineers were responsible for 51 percent of the EISs performed during the deWitt study period.[12]

These delays and inefficiencies in our country's federal environmental review and permitting process are systemic problems that are pervading our country across geographic and industry lines. In the World Bank and International Finance Corporation's most recent "Ease of Doing Business" index, the United States ranks **34th in the world** in the category "Dealing with Construction Permits" (in other words, permitting and building projects). If this ranking and the problems with the permitting system persist, real dollars will be lost, along with good-paying jobs. In July 2014, The Associated General Contractors of America testified at a subcommittee hearing for the House Transportation and Infrastructure Committee that in 2013, $911 billion in public and private investment in the construction of residential and nonresidential structures occurred in the United States.[13] The construction industry contributes significantly to employment and GDP – "[a]n extra $1 billion in nonresidential construction spending adds about "3.4 billion to GDP, about $1.1 billion to personal earnings and creates or sustains 28,500 jobs."[14]

B. The U.S. Chamber's *Project No Project* Inventory and its Significance

In 2009, the Chamber unveiled *Project No Project*, an initiative that catalogued the broad range of energy projects that were delayed or halted because of the inability to obtain permits and endless legal challenges by opponents of development. Results of the assessment are compiled onto the *Project No Project* Website (http://www.projectnoproject.com). The purpose of the *Project No Project* initiative was to understand the impacts of serious project impediments on our nation. It remains the only attempt to catalogue the wide array of energy projects being challenged nationwide.

Through *Project No Project*, the Chamber identified usable information for 333 distinct projects. These included 22 nuclear projects, 1 nuclear disposal site, 21 transmission projects, 38 gas and platform projects, 111 coal projects and 140 renewable

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[9] Piet deWitt, Carole A. deWitt, "How Long Does It Take to Prepare an Environmental Impact Statement?" *Environmental Practice* 10 (4), December 2008.
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Available at* http://transportation.house.gov/uploadedfiles/2014-07-15-pilconis.pdf.
[14] *Id.* at 9.

energy projects—notably 89 wind, 4 wave, 10 solar, 7 hydropower, 29 ethanol/biomass and 1 geothermal project. Given that some of the electric transmission projects were multi-state investments and, as such, necessitate approval from more than one state, these investments were apportioned among the states, resulting in 351 state-level projects attributed to forty-nine states.

The results of the inventory were revealing. One of the most surprising findings is that it has been just as difficult to build a wind farm in the U.S. as it is to build a coal-fired power plant. In fact, over 40 percent of the challenged projects identified in our study were renewable energy projects. Often, many of the same groups urging us to think globally about renewable energy are acting locally to stop the very same renewable energy projects that could create jobs and reduce greenhouse gas emissions. Activists have blocked more renewable projects than coal-fired power plants by organizing local opposition, changing zoning laws, opposing permits, filing lawsuits, and using other delay mechanisms, thereby effectively bleeding projects dry of their financing.

Full descriptions for each project are available on the *Project No Project* Website.

It quickly became clear from our research that the nation's complex, disorganized process for permitting new facilities and its frequent manipulation by opponents constitute a major impediment to economic development and job creation. Which prompted the next question: what are the economic effects of this problem on the economy and job growth?

According to an economic study that we commissioned, the successful construction of the 351 projects identified in the *Project No Project* inventory could have produced a $1.1 trillion short-term boost to the economy and created 1.9 million jobs annually during the projected seven years of construction.[15] Moreover, after these facilities are constructed, they would continue to generate jobs because they operate for years or even decades. According to the study, in aggregate, each year of operation of these projects could generate $145 billion in economic benefits and involve 791,000 jobs.

If our great nation is going to begin creating jobs at a faster rate, we must get back in the business of building things. But that is only going to happen if we figure out how to eliminate inefficiency, duplication and delays in our federal environmental review and permitting process. Otherwise, that process will continue to lead to stalled or even cancelled projects across the country.

C. Broad, Bipartisan Support for Permit Streamlining

Permit streamlining traditionally draws bipartisan support in concept, but little progress had been achieved until relatively recently.[16] Democrats, Republicans, the White House, and the business community all agree that we must remove needless red tape that stalls and often kills major development projects:

- In February 2015, the Administration released its proposed Fiscal Year 2016 Budget, which states that "[t]o further accelerate economic growth and improve the competitiveness of the American economy, the Administration is taking action to modernize and improve the efficiency of the Federal permitting process for major infrastructure projects."[17]

- President Obama pledged to cut "red tape" to help build new factories that use natural gas in his 2014 State of the Union address, and he pledged to speed up "new oil and gas permits" in his 2013 State of the Union address.

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[15] The Chamber-commissioned economic study is titled *Progress Denied: The Potential Economic Impact of Permitting Challenges Facing Proposed Energy Projects*, which was produced by Steve Pociask of TeleNomic Research, LLC and Joseph P. Fuhr, Jr., Ph.D, of Widener University. An electronic copy of the study can be accessed at http://www.projectnoproject.com/progress-denied-a-study-on-the-potential-economic-impact-of-permitting-challenges-facing-proposed-energy-projects/.

[16] Piet de Witt, Carole A. deWitt, "How Long Does It Take to Prepare an Environmental Impact Statement?" *Environmental Practice* 10 (4), December 2008 ("Concern about streamlining the EIS preparation process transcends political party"). As described later in this testimony, streamlining provisions in MAP-21, SAFETEA-LU and the American Recovery and Reinvestment Act have yielded positive and substantial results.

[17] *Available at* http://www.whitehouse.gov/sites/default/files/omb/budget/fy2016/assets/investing.pdf.

- In May 2014, President Obama issued a "Presidential Memorandum on Modernizing Infrastructure Permitting"[18] and the Steering Committee on Federal Infrastructure Permitting and Review Process Improvement released an "Implementation Plan" for the Memorandum.[19] The goal of the Implementation Plan was to: "[m]odernize the Federal permitting and review process for major infrastructure projects to reduce uncertainty for project applicants, reduce the aggregate time it takes to conduct reviews and make permitting decisions by half, and produce measurably better environmental and community outcomes."[20]

- In September 2013, Vice President Biden visited the Savannah, Georgia port, where the environmental review process for a project to deepen the harbor there had been ongoing since 1999. During his visit, the Vice President was quoted as saying, "What are we doing here? We're arguing about whether or not to deepen this port? … It's time we get moving. I'm sick of this. Folks, this isn't a partisan issue. It's an economic issue."[21]

- In April 2013, Senator Barbara Boxer (CA) was quoted in April 2013 as saying, "[t]he environmentalists don't like to have any deadlines set so that they can stall projects forever…I think it's wrong, and I have many cases in California where absolutely necessary flood control projects have been held up for so long that people are suffering from the adverse impacts of flooding."[22] She also added that she did not think that environmentalists' concerns about potentially rushed permit approvals were "legitimate."[23] The Senator made these comments in support of legislation that would impose deadlines for environmental reviews of water projects.

- Democratic Governor Jerry Brown of California, in his January 24, 2013 State of the State, called upon lawmakers to "rethink and streamline our regulatory procedures" so they are "based upon more consistent standards that provide greater certainty and cut needless delays."

- In March 2012, President Obama issued Executive Order 13604, aimed at "Improving Performance of Federal Permitting and Review of Infrastructure Projects."[24] The Executive Order directs federal agencies to ramp up efforts to improve the federal permitting process by institutionalizing best practices,

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[18] *Available at* http://www.whitehouse.gov/the-press-office/2014/05/14/fact-sheet-building-21st-century-infrastructure-modernizing-infrastructu.
[19] *Available at* http://www.permits.performance.gov/pm-implementation-plan-2014.pdf.
[20] *Available at* http://www.permits.performance.gov/pm-implementation-plan-2014.pdf.
[21] http://www.wjcl.com/news/news/breaking-news/vice-president-vows-savannah-dredging-will-happen-tuZyTG/.
[22] April 28, 2013 *Los Angeles Times* article by Richard Simon, "Sen. Boxer finds herself at odds with environmentalists." (*Available at* http://latimes.com/news/nationworld/nation/la-na-boxer-environmentalists-20130429,0,1134896.story)
[23] *Id.*
[24] *Available at* http://www.whitehouse.gov/the-press-office/2012/03/22/executive-order-improving-performance-federal-permitting-and-review-infr.

reducing the amount of time required to make permitting and review decisions, and improving environmental and community outcomes.[25]

In 2011, the President's Council on Jobs and Competitiveness developed—in consultation with the Chamber and a wide range of stakeholders—a set of common-sense initiatives to boost jobs and competitiveness. Chief among these initiatives was a set of ideas to "simplify regulatory review and streamline project approvals to accelerate jobs and growth."[26] Recommendations included early stakeholder engagement, reduced duplication among local, state and federal agency reviews, and improved litigation management.[27]

D. The Recovery Act, SAFETEA-LU and MAP-21: Congress Streamlines the Process

During debate on the 2009 economic stimulus bill which became the American Recovery and Reinvestment Act ("Recovery Act"), the Chamber called attention to the fact that our nation's flawed permitting process would ensure that no Recovery Act project would ever truly be "shovel-ready." Senators Barrasso and Boxer worked together to secure an amendment to the bill requiring that the NEPA process be implemented "on an expeditious basis," and that "the shortest existing applicable process" under NEPA had to be used.

The Barrasso-Boxer amendment, which became Section 1609 of the Recovery Act, had a huge impact. According to CEQ data, 192,707 NEPA reviews were required for Recovery Act projects; 184,733 of them were satisfied through the use of categorical exclusions.[28] 7,133 reviews went through an environmental assessment (EA) and received a finding of no significant impact (FONSI).[29] Only 841 required an EIS, the longest available process under NEPA.[30]

Likewise, a statutory provision Congress passed in 2005 has been another success story for permit streamlining: Section 6002 of the Safe, Accountable, Flexible, Efficient Transportation Act: A Legacy for Users (SAFETEA-LU).[31] The structure of the RAPID

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[25] The Federal Plan for implementing Executive Order 13604 identifies two comprehensive goals: (1) more efficient and effective review of large-scale and complex infrastructure projects, culminating in better projects, improved outcomes for communities, and faster permit decision-making and review timelines; and (2) transparency, predictability, accountability, and continuous improvement of routine infrastructure permitting and reviews. *Available at* https://permits.performance.gov/sites/all/themes/permits2/files/federal_plan.pdf .

[26] "Interim Report of the President's Council on Jobs and Competitiveness, *available at* http://www.jobs-council.com/recommendations/streamline-regulations-that-hurt-job-creation/.

[27] *Id.*

[28] The Eleventh and Final Report on the National Environmental Policy Act Status and Progress for American Recovery and Reinvestment Act of 2009 Activities and Projects, *available at* http://ceq.hss.doe.gov/ceq_reports/reports_congress_nov2011.html.

[29] *Id.*

[30] *Id.*

[31] Public Law 109-59 (2005).

Act is strikingly similar to Section 6002. Many of its best provisions—schedule requirements, concurrent reviews, and the statute of limitations—are identical to Section 6002. The section contains two key components: (1) process streamlining and (2) a statute of limitations.

The process streamlining component does not in any way circumvent any substantive NEPA requirement; in fact, the statute explicitly provides that "[n]othing in this subsection shall reduce any time period provided for public comment in the environmental review process." For the transportation projects covered by SAFETEA-LU, Section 6002 designates DOT as lead agency and requires early participation by other participating agencies. It requires federal agencies to conduct NEPA reviews concurrently (rather than sequentially), requires early identification and development of issues, and sets deadlines for decisions under other federal laws. The goal of the process streamlining provision was not to escape NEPA, but merely to facilitate interagency and public coordination so that the process could be completed without endless delays.

The second key element in Section 6002 is a 180-day statute of limitations to "use it or lose it" on judicial review. Without such a provision, the prevailing statute of limitations is the default six-year federal statute of limitations for civil suits.

Section 6002 has worked, and worked well. A September 2010 report by the Federal Highway Administration found that just the process streamlining component of Section 6002 has cut the time to complete a NEPA review in half, from 73 months down to 36.85 months.[32]

Further evidence of the success of Section 6002 from SAFETEA-LU is the fact that the successor highway bill – Moving Ahead for Progress in the 21st Century Act (MAP-21) – adopted nearly all of the same process streamlining and environmental review provisions. Like its predecessor, MAP-21 is also leading to positive outcomes in the permitting process.

At a September 18, 2013 hearing of the Senate Environment and Public Works Committee, John Porcari, the Deputy Secretary of the U.S. Department of Transportation, testified that:

> The project delivery provisions found in MAP-21 are in many cases consistent with the Administration's broader efforts. The provisions on programmatic mitigation of environmental impacts, eliminating duplicate reviews, integration of planning and environmental reviews, and assistance to affected Federal and State agencies will help us to move infrastructure projects from concept to completion more efficiently. This will ensure the best value for every taxpayer dollar and reduce undue regulatory

[32] Federal Highway Administration, *Integrating Freight into NEPA Analysis* (Sept. 2010), available at http://ops.fhwa.dot.gov/publications/fhwahop10033/index.htm.

> burden in delivering transportation projects, while achieving measurably better environmental outcomes.[33]

The DOT Deputy Secretary added that changes to the statute of limitations provision through MAP-21 "ha[d] reduced litigation risk for over a dozen projects thus far."[34] These are concrete and measurable successes resulting from federal permitting reform efforts, many of which share the same hallmarks as the RAPID Act.

E. The RAPID Act Delivers Effective Permitting Reform

The RAPID Act takes the most effective elements of SAFETEA-LU and MAP-21—concurrent reviews, deadlines, the statute of limitations—and applies them to all infrastructure projects. The RAPID Act almost exclusively relies upon concepts that are part of existing law and that have been shown to work in other contexts, such as SAFETEA-LU and MAP-21.

- Early designation of a lead agency, participating agencies and cooperating agencies when multiple agencies are involved in a NEPA review;
- Acceptance of state "little NEPA" reviews where the state has an equivalent process, avoiding needless duplication of state work with the federal NEPA review;
- Imposition of a duty on agencies to involve themselves in the process early and comment early, or be precluded from raising subsequent objections;
- A reasonable process for determining the scope of alternatives, so that the NEPA review does not turn in to a limitless quest to evaluate millions of infeasible alternatives;
- Consolidation of the process into a single EIS and single EA for a NEPA project, except as otherwise provided by law.
- Allowance of the project sponsor to participate in the preparation of environmental documents and provide funding—a reform made recently by California in state permit streamlining reforms;
- A requirement that each alternative include an analysis of employment impacts;
- Creation of a schedule for the EIS or EA, including deadlines for decisions under other Federal laws;
- Reasonable fixed deadlines for completion of an EIS or EA; and
- Reduction in the statute of limitations to challenge a final EIS or EA from six years down to 180 days.

The shorter statute of limitations—which, again, has worked as part of SAFETEA-LU and MAP-21—closes a loophole in the system, the six-year statute of limitations to challenge final NEPA action. Consider that a challenge to a final regulation (which in most circumstances has a much greater impact on the public than a

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[33] http://www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=2826fe72-3218-404f-aea6-4578cbb44324

[34] *Id.*

single project) is limited to 60 days; why then does a challenge to a different final agency action, an EIS, require six years? The RAPID Act harmonizes judicial review of NEPA decisions with review of other final agency actions under the Administrative Procedure Act.

II. H.R. 712, THE "SUNSHINE FOR REGULATORY DECREE SAND SETTLEMENTS ACT OF 2015"

A. Background

Over the past several years, the business community has expressed growing concern about interest groups using lawsuits against federal agencies and subsequent settlements approved by a judge as a technique to shape agencies' regulatory agendas. Recent sue and settle arrangements have fueled fears that the rulemaking process itself is being subverted to serve the ends of a few favored interest groups. The Chamber set out to determine how often sue and settle actually happens, to identify major sue and settle cases, and to track the types of agency actions involved. After an extensive effort, the Chamber was able to compile a database of sue and settle agreements and their subsequent rulemaking outcomes. The overwhelming majority of sue and settle actions between 2009 and 2012 occurred in the environmental context, particularly under the Clean Air Act, Clean Water Act, and the Endangered Species Act,[35] as explained in the Chamber's May 2013 report, *Sue and Settle: Regulating Behind Closed Doors*. The report provides detailed information on the extent of the sue and settle problem, as well as the public policy implications of having private parties exert direct influence on the regulatory priorities of federal agencies through agreements negotiated behind closed doors, without public participation.

B. What is Sue and Settle and Why Is It a Problem?

Sue and settle occurs when an agency intentionally relinquishes its statutory discretion by accepting lawsuits from outside groups which effectively dictate the priorities and duties of the agency through legally-binding, court-approved settlements negotiated behind closed doors – with no participation by other affected parties or the public.[36]

As a result of the sue and settle process, the agency intentionally transforms itself from an independent actor that has discretion to perform its duties in a manner best

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[35] Clean Air Act, 42 U.S.C. § 7401 *et seq.*; Clean Water Act, 33 U.S.C. § 1251 *et seq.*; Endangered Species Act, 16 U.S.C. § 1531 *et seq.*

[36] The coordination between outside groups and agencies is aptly illustrated by a November 2010 sue and settle case where EPA and an outside advocacy group filed a consent decree and a joint motion to enter the consent decree with court *on the same day* the advocacy group filed its Complaint against EPA. *See Defenders of Wildlife v. Perciasepe*, No. 12-5122, slip op. at 6 (D.C.Cir. Apr. 23, 2013).

serving the public interest, into an actor subservient to the binding terms of settlement agreements, including using its congressionally-appropriated funds to achieve the demands of specific outside groups. This process also allows agencies to avoid the normal protections built into the rulemaking process – review by the Office of Management and Budget and the public, and compliance with executive orders – at the critical moment when the agency's new obligations are created.

Because sue and settle agreements developed through the imposition of a court-approved consent decree bind an agency to meet a specified deadline for regulatory action – a deadline the agency often cannot meet – the agreement essentially reorders the agency's priorities and its allocation of resources. These agreements often go beyond simply enforcing statutory deadlines and themselves become the legal authority for expansive regulatory action with no meaningful participation by affected parties or the public. The realignment of an agency's duties and priorities at the behest of an individual special interest group runs counter to the larger public interest and the express will of Congress.

C. What Did Our Sue-and-Settle Research Reveal?

Our research shows that from 2009 to 2012, a total of 71 lawsuits were settled under circumstances such that they can be categorized as sue and settle cases under the Chamber's definition. These cases include EPA settlements under the Clean Air Act and the Clean Water Act, along with key Fish and Wildlife Service settlements under the Endangered Species Act. Significantly, settlement of these cases directly resulted in more than 100 new federal rules, many of which are major rules estimated to cost more than $100 million annually to comply with.

EPA is required by the Clean Air Act to publish public notices of draft consent decrees in the *Federal Register*.[37] Based on these *Federal Register* notices, the Chamber could identify Clean Air Act settlements/consent decrees going back to 1997. Comparing the number of Clean Air Act sue and settle agreements between 1997 and 2014, we determined that sue and settle is by no means a recent phenomenon;[38] the tactic has been used during both Democratic and Republican administrations. To the extent that the sue and settle tactic skirts the normal notice and comment rulemaking process, with its

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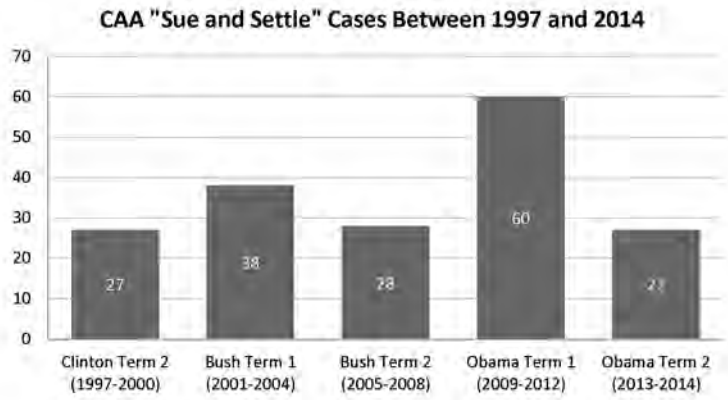
[37] Section 113(g) of the Clean Air Act, 42 U.S.C. § 7413(g), provides that "[a]t least 30 days before a consent decree or settlement agreement of any kind under [the Clean Air Act] to which the United States is a party (other than enforcement actions) . . . the Administrator shall provide a reasonable opportunity by notice in the Federal Register to persons who are not named as parties or intervenors to the action or matter to comment in writing." Of all the other major environmental statutes, only section 122(i) of the Superfund law, 42 U.S.C. § 9622(i) requires an equivalent public notice of a settlement agreement.

[38] The sue and settle problem dates back at least to the 1980s. In 1986, Attorney General Edward Meese III issued a Department of Justice policy memorandum, referred to as the "Meese Memo," addressing the problematic use of consent decrees and settlement agreements by government, including the agency practice of turning discretionary rulemaking authority into mandatory duties. *See* Meese, Memorandum on Department Policy Regarding Consent Decrees and Settlement Agreements (Mar. 13, 1986).

procedural checks and balances, agencies have been willing for decades to allow sue and settle to skirt the rulemaking requirements of the Administrative Procedure Act.[39] Moreover, our research found that business groups have also taken advantage of the sue and settle approach to influence the outcome of EPA actions. While advocacy groups have used sue and settle much more often in recent years, the tactic has clearly been used by both sides. The following chart compares the consent decrees finalized under the Clean Air Act during that period.



[39] 5 U.S.C. Subchapter II.

Sue and Settle Agreements Create Costly Federal Rules

1. Utility MACT rule - up to **$9.6 billion** annual costs[40]
2. Lead Repair, Renovation & Painting rule - up to **$500 million** in first-year costs[41]
3. Oil and Natural Gas MACT rule - up to **$738 million** annual costs[42]
4. Florida Nutrient Standards for Estuaries and Flowing Waters - up to **$632 million** annual costs[43]
5. Regional Haze Implementation rules: **$2.16 billion** cost[44]
6. Chesapeake Bay Clean Water Act rules - up to **$18 billion** cost to comply[45]
7. Boiler MACT rule - up to **$3 billion** cost to comply[46]
8. Standards for Cooling Water Intake Structures - up to **$384 million** annual costs[47]
9. Revision to the Particulate Matter ($PM_{2.5}$) NAAQS - up to **$350 million** annual costs[48]
10. Reconsideration of 2008 Ozone NAAQS - up to **$90 billion** cost[49]

D. Sue and Settle Goes Far Beyond Simply Enforcing Statutory Deadlines

Groups that rely on the sue and settle process argue that these lawsuits are just about deadlines, and that the settlements are only about **when** the agency must do its nondiscretionary duty. They contend that because agencies only agree to do by a specific date what Congress instructed them to do earlier, involving other stakeholders in settlement negotiations is pointless. This argument ignores several critical facts, however.

First, EPA is subject to numerous statutory deadlines for regulatory action, particularly deadlines under the 1990 Clean Air Act Amendments. EPA nearly always fails to meet these deadlines. Since 1993, **98%** of EPA regulations (196 out of 200) under the major Clean Air Act programs (NAAQS, NESHAP, NSPS) were tardy, by an average

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[40] Letter from President Obama to Speaker Boehner (Aug. 30, 2011), Appendix "Proposed Regulations from Executive Agencies with Cost Estimates of $1 Billion or More."
[41] 75 Fed. Reg, 24,802, 24,812 (May 6, 2010).
[42] Fall 2011 Regulatory Plan and Regulatory Agenda, "Oil and Natural Gas Sector-NSPS and NESHAPS," RIN: 2060-AP76.
[43] EPA, Proposed Nutrient Standards for Florida's Coastal, Estuarine & South Florida Flowing Waters (Nov. 2012).
[44] William Yeatman, *EPA's New Regulatory Front: Regional Haze and the Takeover of State Programs* (July 2012).
[45] Sage Policy Group, Inc., *The Impact of Phase I Watershed Implementation Plans on Key Maryland Industries* (April 2011); *Chesapeake Bay Journal* (Jan. 2011).
[46] Letter from President Obama to Speaker Boehner, *supra* note 8.
[47] 2012 Regulatory Plan and Unified Agenda, "Standards for Cooling Water Intake Structures," RIN: 2040-AE95.
[48] EPA, "Overview of EPA's Revisions to the Air Quality Standards for Particle Pollution (Particulate Matter) (2012).
[49] Letter from President Obama to Speaker Boehner, *supra* note 8.

of *5½ years* past their deadlines.[50] If EPA misses almost all of its Clean Air Act deadlines, and the agency acts in good faith, then the agency clearly has been given responsibilities by Congress that it cannot meet.

Second, by being able to sue and influence agencies to take actions on specific regulatory programs, advocacy groups use sue and settle to dictate the policy and budgetary agendas of an agency. Instead of agencies being able to use their discretion as to how best utilize their limited resources, they are forced to shift these resources away from critical duties in order to satisfy the narrow demands of outside groups. Through the appropriations process, Congress has the authority to control EPA's budget and resource priorities. Congress should not allow advocacy groups and the agency to use the sue and settle process to circumvent the appropriations process.

Third, when advocacy groups and agencies negotiate deadlines and schedules for new rules through the sue and settle process, the ensuing rulemaking often rushed and flawed. By agreeing to deadlines that are unrealistic and often unachievable, the agency lays the foundation for rushed, sloppy rulemaking that delays or defeats the objective the agency is seeking to achieve.[51] These hurried rulemakings typically require correction through technical corrections, subsequent reconsiderations or court-ordered remands to the agency. Ironically, the process of issuing rushed, poorly-developed rules and then having to spend months or years to correct them defeats the advocacy group's objective of forcing a rulemaking on a tight schedule.

By setting accelerated deadlines, agencies very often give themselves insufficient time to comply with the important analytic requirements that Congress enacted to ensure sound policymaking. These requirements include the Regulatory Flexibility Act (RFA)[52] and the Unfunded Mandates Reform Act.[53] In addition to undermining the protections of these statutory requirements, rushed deadlines can limit the review of regulations under the Office of Management and Budget's regulatory review under executive orders,[54] among other laws. This short-circuited process deprives the public (and the agency itself) of critical information about the true impact of its rule. An unreasonable deadline for one rule draws resources from other regulations that may also be under deadlines. Resulting

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[50] Competitive Enterprise Institute, *EPA's Shocking Record of Failure on Statutory Deadlines Raises Serious Questions: Since 1993, Only 2 Percent of Clean Air Act Regulations Promulgated On Time* (July 10, 2013).

[51] In the Boiler MACT rulemaking, for example, EPA asked the court for an additional 16 months to properly consider comments it had received and finalize a legally defensible rule. In the face of opposition from the advocacy group, the court only granted an additional month, however, and EPA was forced to immediately reconsider the rule to buy itself more time.

[52] Regulatory Flexibility Act of 1980, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. §§ 601-612.

[53] Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1531-1538.

[54] *See, e.g.,* Executive Order 12,866, "Regulatory Planning and Review" (September 30, 1993); Executive Order 13132, "Federalism" (August 4, 1999); Executive Order 13,211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (May 18, 2001); Executive Order 13,563 "Improving Regulation and Regulatory Review" (January 18, 2011).

delays will invite advocacy groups to reorder an agency's priorities further when they sue to enforce the other rules' deadlines.

This is illustrated clearly by sue and settle agreements entered into between advocacy groups and the U.S. Fish and Wildlife Service (FWS). FWS agreed in May and July 2011 to two consent decrees with an environmental advocacy group requiring the agency to propose adding more than 720 new candidates to the list of endangered species under the ESA.[55] Agreeing to propose listing this many species all at once imposes an overwhelming new burden on the agency, which requires redirecting resources away from other—often more pressing—priorities in order to meet agreed deadlines. According to the Director of the FWS, in FY 2011 the FWS was allocated $20.9 million for endangered species listing and critical habitat designation; the agency was required to spend more than 75% of this allocation ($15.8 million) undertaking the substantive actions required by court orders or settlement agreements resulting from litigation.[56] In other words, sue and settle cases and other lawsuits are now driving the regulatory agenda of the Endangered Species Act program at FWS.

Fourth, through sue and settle, advocacy groups can also significantly affect the regulatory environment by compelling an agency to issue substantive requirements that are not required by law.[57] Even when a regulation is required, agencies can use the terms of sue and settle agreements as a legal basis for allowing special interests to dictate the discretionary terms of the regulations.[58] Third parties have a very difficult time challenging the agency's surrender of its discretionary power, because they typically cannot intervene and the courts often simply want the case to be settled quickly.

Finally, one of the primary reasons that advocacy groups favor sue and settle agreements approved by a court is that the court retains long-term jurisdiction over the settlement and the plaintiff group can readily enforce perceived noncompliance with the agreement by the agency. The court in the endangered species agreements discussed above will retain jurisdiction over the process until 2018, thereby binding FWS Directors in the next Administration to follow the requirements of the two 2011 settlements. For its part, the agency cannot change any of the terms of the settlement (e.g., an agreed deadline for a rulemaking) without the consent of the advocacy group. Thus, even when an agency subsequently discovers problems in complying with a settlement agreement, the advocacy group typically can force the agency to fulfill its promise in the consent decree, regardless of the consequences for the agency or regulated parties.

For all these reasons, "sue and settle" violates the principle that if an agency is going to write a rule, the goal should be to develop the most effective, well-tailored regulation. Instead, rulemakings that are the product of sue and settle agreements are

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[55] *Wildearth Guardians v. Salazar* (D.D.C. May 10, 2011); *Center for Biological Diversity v. Salazar* (D.D.C. July 12, 2011).

[56] Testimony of Hon. Dan Ashe, Director, U.S. Fish and Wildlife Service before the House Natural Resources Committee (December 6, 2011).

[57] For example, EPA's imposition of TMDL and stormwater requirements on the Chesapeake Bay was not mandated by federal law.

[58] Agreed deadlines commit an agency to make one specific rulemaking a priority, ahead of all other rules.

most often rushed, sloppy, and poorly thought-out. These flawed rules often take a great deal of time and effort to correct. It would have been better—and ultimately faster—to take the necessary time to develop the rule properly in the first place.

E. GAO's December 2014 report

The Government Accountability Office (GAO) evaluated settlement agreements the U.S. Environmental Protection Agency (EPA) entered into between May 31, 2008 and June 1, 2013 that resolved deadline suits filed against the agency by advocacy groups. The report finds that EPA issued 32 major rules (rules with anticipated annual compliance costs of $100 million or more) during that time period, and that 9 of these rules were the result of 7 settlement agreements in deadline suits. The report concludes that these settlement agreements had little or no impact on EPA or its rulemakings because they did not require EPA to modify its discretion, take an otherwise discretionary action, or prescribe a specific substantive rulemaking outcome. The report, which has been cited by opponents of greater transparency in the sue and settle process, suffers from fatal flaws, however.

1. *The report is not objective.*

The report acknowledges that GAO relied exclusively on statements and materials provided by EPA and Department of Justice (DOJ) personnel and that GAO made no attempt to conduct any research of its own. Accordingly, the report only parrots the positions on the "sue and settle" issue stated by EPA and DOJ. Moreover, while the report notes that "[w]e relied on EPA because neither EPA nor DOJ maintain a database that links settlements to rules, and there is no comprehensive public source of such information," GAO apparently does not consider this lack of transparency to be a problem. For years, Congress and the public have asked EPA to release more information about sue and settle negotiations and agreements, which the agency has refused to provide. The report simply accepts EPA's lack of transparency as a fact, rather than considering its adverse impact on the rulemaking process.

2. *The report ignores or misrepresents key facts.*

The report notes that all of the settlement agreements studied came out of just one EPA office, the Office of Air and Radiation (OAR). While this implies that settlement agreements are an isolated, perhaps unimportant phenomenon at EPA, the report ignores the fact that Clean Air Act rules issued by OAR represented **96.6% of total annual costs of all EPA regulations issued between 2008 and 2013.**[59]

Significantly, the report only considers 7 settlement agreements. Based on *Federal Register* notices of proposed Clean Air Act settlement agreements lodged with

[59] Source: EPA Regulatory Impact Analyses for the individual rules. With a 7% discount rate, these rules totaled $56.9 billion in estimated compliance costs.

the courts, at least **60** such agreements were reached between 2009 and 2012.[40] Why were the vast majority of these agreements ignored?

3. The report is misleading.

The title of the report gives the impression that GAO's research found that settlement agreements in deadline suits have no impact on rules issued by EPA or on the public's ability to participate in agency decision-making. The report itself contradicts this impression. The report states that with respect to the recurring review of hazardous air pollutant standards for specific industries under the NESHAP program, "most of the resources available to complete [the recurring reviews] are focused on a 2011 settlement . . . and they have been unable to meet all of the time frames contained in the 2011 settlement. . . . .Officials said they intend to complete all of the overdue [reviews] but are focused on fulfilling the terms of the 2011 settlement and several other settlements[.]" In other words, the 2011 settlement and other settlements have forced EPA to redirect its resources into meeting agreed-upon deadlines, to the detriment of all other scheduled reviews, which themselves are overdue.
EPA often agrees to bind itself to deadlines for regulatory action that it cannot meet. The agency subsequently uses the deadline it agreed to as justification for requiring shorter comment periods, relying on incomplete or questionable technical data, and cutting corners on regulatory reviews. The resulting rulemakings are rushed, sloppy, and often require years of litigation to fix.

F. Notice and Comment *After* Sue and Settle Agreements Doesn't Give the Public Real Input

The opportunity to comment on the product of sue and settle agreements, either when the agency takes comment on a draft settlement agreement or takes notice and comment on the subsequent rulemaking, are not sufficient to compensate for the lack of transparency and participation in the settlement process itself. In cases where EPA allows public comment on draft consent decrees, EPA only rarely alters the consent agreement, even after it receives adverse comments.[41]

Moreover, because the settlement agreement directs the timetable and the structure (and sometimes even the actual substance) of the subsequent rulemaking, interested parties usually have very limited ability to alter the design of the final rule or other action through their comments.[42] Rather than hearing from a range of interested

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[40] U.S. Chamber of Commerce, *Sue and Settle: Regulating Behind Closed Doors* (May 2013)at 14.

[41] In proposed settlement agreements the Chamber has commented on, such as for the revised $PM_{2.5}$ NAAQS standard, the timetable for final rulemaking action remained unchanged despite our comments insisting that the agency needed more time to properly complete the rulemaking. Even though EPA itself asserted that more time was needed, the rulemaking deadline in the settlement agreement was not modified.
[42] EPA overwhelmingly rejected the comments and recommendations submitted by the business community on the major rules that resulted from sue and settle agreements. These rules were ultimately

parties and designing the rule with their concerns in mind, the agency essentially writes its rule to accommodate the specific demands of a single interest. Through "sue and settle," advocacy groups achieve their narrow goals at the expense of sound and thoughtful public policy.

Moreover, if regulated parties are not at the table when deadlines are set, an agency will not have a realistic sense of the issues involved in the rulemaking (e.g., will there be enough time for the agency to understand the constraints facing an industry, to perform emissions monitoring, and develop achievable standards?). Especially when it comes to implementation timetables, agencies are ill-suited to make such decisions without significant feedback from those who will have to actually comply with a regulation.

III. CONCLUSION

As *Project No Project* shows, trillions of dollars and millions of American jobs can be created if projects can complete their permitting on a timely basis. NIMBY activism has blocked projects of all shapes and sizes through tactics such as organizing local opposition, changing zoning laws, opposing permits, filing lawsuits, and using other long-delay mechanisms, effectively bleeding projects dry of their financing. There is simply no reason for the United States to be tied with Papua New Guinea for last place in the world on the time it takes to permit a new mine.[61]

The RAPID Act restores Congressional intent and allows environmental reviews under NEPA to function as designed. It sets forth a common-sense procedure for completion of environmental reviews—one that already works in the transportation context and has enjoyed broad, bipartisan support. And, the RAPID Act does not remove or modify any public citizen's right or ability to participate in the NEPA process.

If enactment of the RAPID Act could have the same impact on energy, forest management, and intermodal projects that SAFETEA-LU Section 6002 and MAP-21 have had on transportation projects, Congress will have done wonders to create jobs and boost our economic recovery.

Likewise, the regulatory process should not be radically altered simply because of a consent decree or settlement agreement. There should not be a two-track system that allows the public to meaningfully participate in rulemakings, but excludes the public from the "sue and settle" negotiation and settlement process that results in rulemakings designed to benefit a specific interest group. There should not be one system where agencies can use their discretion to develop rules and another system where advocacy groups use lawsuits to legally bind agencies to improperly hand over their discretion.

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promulgated largely as they had been proposed. *See, e.g.*, the Chamber's 2012 comments on the proposed PM NAAQS rule and the proposed GHG NSPS rule for new electric utilities.

[61] *2012 Ranking of Countries for Mining Investment*, Behre Dolbear Group at 8. *See* www.dolbear.com.

H.R. 712 would implement these and other important common-sense changes. It is a law based on good government principles recognizing the importance of open government and public participation. This legislation would address the "sue and settle" problem and make federal agencies' regulatory agendas more transparent, open, and accountable.

For all of these reasons, the Chamber strongly supports passage of the RAPID Act and the Sunshine for Regulatory Decrees and Settlements Act of 2015, and stands ready to work with the Subcommittee to move the bill through Congress. Thank you for the opportunity to testify today. I look forward to answering any questions you may have.

Mr. MARINO. Mr. Batkins.

TESTIMONY OF SAM BATKINS, DIRECTOR OF REGULATORY POLICY, AMERICAN ACTION FORUM

Mr. BATKINS. Thank you, Chairman Marino, Ranking Member Johnson and Members of the Subcommittee.

The Federal Government should endeavor to remove outdated regulations that stifle job creation and make our economy less competitive. That was President Obama echoing similar statements made from every President since Jimmy Carter. Both Presidents focused on regulatory accumulation and both tasked their agencies to look back at their existing regulatory slate and reform rules.

Yet more than a generation later, here we are again discussing reform regulation. And it is because regulatory reform has failed so often in the past that we continue to talk about its place in the future. When we say past reform has failed, it is not just a cavalier opinion, it is a fact. The agencies and the Administration tell us reform has failed. Every year the Office of Information and Regulatory Affairs OIRA discloses hundreds of paperwork violations. HHS alone was responsible for 80 violations last year.

When Congress amended the Paperwork Reduction Act in the 1990's, OIRA set a goal to reduce cumulative regulatory burdens by 35 percent, a reduction of 4.6 billion hours. Instead regulators increased paperwork hours by 17 percent.

Then, Congress passed the Congressional Review Act the CRA, they instructed agencies to send all rules including major regulations to Congress and the Government Accountability Office, they haven't. In a recent report Curtis Copeland, at the Administrative Conference of the United States found thousands of rules that violated the CRA, including 43 major rules.

In 2012, only 71.6 percent of Federal rules followed CRA procedure. I am sure regulators expect better compliance rates from companies and that Congress expects better performance from regulatory agencies. The history of regulatory reform instructs the debate today. It is clear that given the current resources at agencies, regulatory reform and looking back at existing rules might not be a major priority. And that's understandable, but just look at the retrospective reports that claim that new ACA rules or the regulation on for-profit colleges universities is somehow considered a regulatory lookback.

Either agencies examine past regulations and seek to improve their effectiveness or they implement rules that to add to the cumulative regulatory burden. Too often agencies practice the latter. If that's retrospective review, then everything is. Asking agencies to issue new regulations and examine the cumulative impact of existing rules appears to be asking for too much. This is why scholars from across the political spectrum have endorsed the idea of an independent commission charged with reviewing the regulatory burden. A body charged with conducting a comprehensive analysis of the regulatory state while ensuring that our regulations remain effective could yield tremendous benefits.

The goal is not to undue the regulatory state, the goal is to improve it. There is so much we simply don't know about the 175,000 pages of Federal regulation. This ignorance doesn't help us ensure

the health and safety of Americans and it doesn't help us promote economic growth.

As President Carter and President Obama understood, there have been tremendous benefits to regulatory reform, and there are additional cost savings that could be achieved here today. According to our estimates, it's successful. It could generate approximately 1.5 billion hours of less paperwork for Americans, anywhere from 48 billion to 90 billion in reduced regulatory costs.

The dual goals of a thorough review of the entire regulatory system and reducing burdens by 15 percent are ambitious, but so were the initial executive orders on regulatory reform. While past attempts at reform might have been unsuccessful, there is no reason policymakers can't learn from previous mistakes and establish a balanced system that increases transparency, evaluates the regulatory slate and reduces burdens and rules all while protecting health and safety. These are bipartisan principles, standard practice internationally and not controversial ideas.

Thank you for the time. I look forward to answering your questions.

Mr. MARINO. Thank you, sir.

[The prepared statement of Mr. Batkins follows:]

H.R. 348, The "RAPID" Act; H.R. 712, The "Sunshine for Regulatory Decrees and Settlements Act of 2015;" and H.R.___, The "SCRUB Act"

United States House of Representatives
Committee on the Judiciary
Subcommittee on Regulatory Reform, Commercial and Antitrust Law

Sam Batkins*
Director of Regulatory Policy
American Action Forum

March 2, 2015

*The views expressed here are my own and not those of the American Action Forum. I thank Dan Goldbeck for his assistance.

Chairman Marino, Ranking Member Johnson, and Members of the Subcommittee, thank you for the opportunity to appear today. In this testimony, I wish to make three basic points:

- Over time, as agencies issue an average of 75 major rules annually, regulatory accumulation will naturally result. Since 2008, regulators have added more than $107 billion in annual regulatory costs. This accumulation affects employment, consumers, and the broader economy.
- It is because regulatory reform has failed so often in the past that we continue to talk about its place in the future. Whether it's the failure of agencies to comply with the Paperwork Reduction Act, the Congressional Review Act, or the current executive orders, it's clear there are opportunities for meaningful reform that address cumulative burdens and the regulatory process.
- The proposed legislation could generate substantial regulatory savings. The American Action Forum (AAF) attempted to quantify savings from the SCRUB Act and the Sunshine for Regulatory Decrees and Settlements Act and found billions of dollars in possible benefits and 1.5 billion hours of less paperwork.

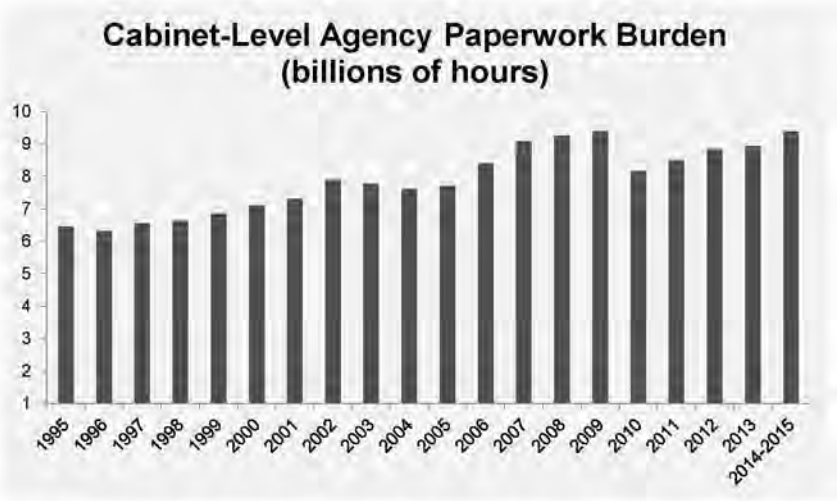
Let me provide additional detail on each in turn.

I. Assessing Cumulative Regulatory Burdens

Decades of attempting to address the regulatory process and accumulation have generally failed to stem the growing influence of new federal rules. Currently, there are more than 70 federal agencies, employing more than 300,000 people who write and execute new regulations.[1] This costs taxpayers at least $60 billion annually. Compare that to the 42 full-time staffers who work at the Office of Information and Regulatory Affairs (OIRA).[2]

Perhaps the easiest way to display the gradual process of regulatory accumulation is to examine federal paperwork burdens over time. The following graph details the cabinet-level paperwork burden (in hours) from 1995 to 2015.

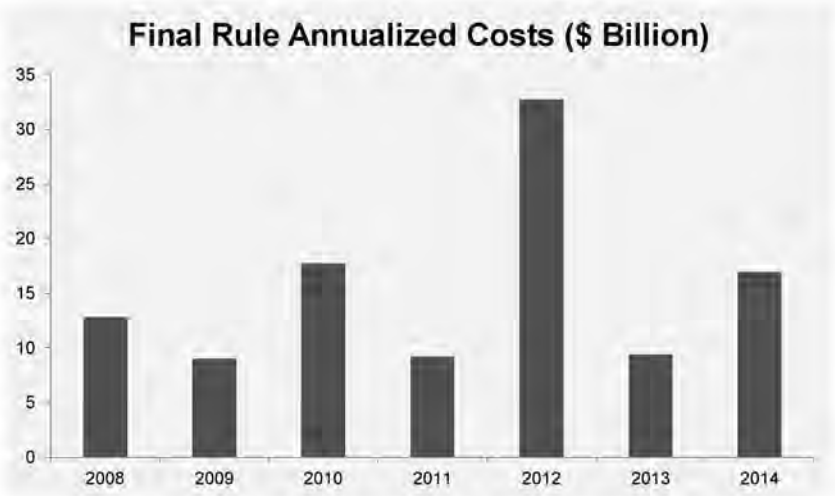
[1] Susan Dudley and Melinda Warren, "2015 Regulators' Budget: Economic Forms of Regulation on the Rise," available at http://regulatorystudies.columbian.gwu.edu/node/224.
[2] Office of Management and Budget, "About OIRA," available at http://www.whitehouse.gov/omb/oira/about.



As the graph reveals, despite several executive orders on reform and legislative remedies designed to address regulatory burdens, the growth in federal regulation remains unabated. From 6.4 billion hours of paperwork in 1995, the number of hours has expanded by more than 45 percent, to 9.3 billion today.

In the more recent history, AAF has tallied the costs, benefits, and paperwork burdens of every rule since 2008. To help the public keep track of all federal regulations, the American Action Forum will soon be launching a website that allows people to generate their own regulatory report based on the Federal Register.

Since 2008, regulators have finalized more than $107 billion in annual regulatory costs (approximately $700 billion in net present value). This is just a recent snapshot and cannot completely capture all cumulative burdens. The graph below displays new annual costs since 2008.



Beyond AAF's work, even the Government Accountability Office (GAO) has made a specific set of recommendations to address government duplication. In 2013, GAO released its annual report on federal "Fragmentation, Overlap, and Duplication."[3] The report found 17 areas of duplication, including renewable energy and veterans' employment. Based on these findings, researchers at AAF replicated GAO's methodology for overlap in paperwork requirements.

The spending equation of government duplication totals approximately $200 billion, according to former Senator Tom Coburn, but regulatory duplication also has a price.[4] Based on the 17 areas of duplication, AAF found 642 million paperwork hours, $46 billion in costs, and 990 forms of federal overlap. For example, ten different agencies are involved in renewable energy programs and produce 96 related forms.[5]

This duplication has real implications for Americans interacting with government. For example, EPA estimates its rule controlling mercury and other air toxics would increase energy prices by 3.1 percent. Because this increase was in line with natural variability in energy prices, the agency discounted this consumer burden. However, EPA also admitted its Cross-State Air Pollution Rule would raise energy prices by 1.7 percent. Again, in isolation, this is a minor fluctuation, but

[3] Government Accountability Office, "2013 Annual Report: Actions Needed to Reduce Fragmentation, Overlap, and Duplication and Achieve Other Financial Benefits," available at http://www.gao.gov/assets/660/653604.pdf.
[4] Senator Tom Coburn, "Letter to Deputy Director Jeffrey Zients," available at http://www.coburn.senate.gov/public/index.cfm?a=Files.Serve&File_id=feba26e1-7102-4a0f-bb55-a91e7477d98f.
[5] American Action Forum, "Weeding Out Regulatory Duplication," available at http://americanactionforum.org/topic/weeding-out-regulatory-duplication.

combined with the mercury rule, consumers now face a 4.8 percent increase.[6] Now, EPA estimates its Clean Power Plan would increase electricity prices by roughly six percent by 2020. If finalized, consumers could face a ten percent cumulative increase in prices during the next five years.[7]

This is just one example of regulatory accumulation from one agency. From more expensive vehicles, to pricier household goods, there are several areas where consumers ultimately bear the burden for each new rule, sometimes from different agencies. It's clear that regulatory accumulation is real and policymakers have few tools available today to measure it and effectively check its growth.

However, the "Regulatory Cut-Go" provision in SCRUB specifically addresses the accumulation of regulation. By ensuring a regulatory neutral approach to costs, the cut-go procedure could stem the tide of regulatory growth while still allowing agencies to fulfill their statutory objectives.

The idea of cut-go is similar to the United Kingdom's One-in, One-Out system for regulation, which has now been expanded to One-In, Two-Out (OITO). This system has saved the country more than $1.83 billion during the last six years.[8] The cut-go idea is also similar to a reform AAF has proposed, a paperwork budget that would only apply to new collections of information.[9] The cut-go plan improves on both of these reforms because it is more comprehensive than a paperwork budget, and it provides agencies with more flexibility than the OITO system.

The hallmarks of retrospective review should be more than just cutting costs and burden hours. It is also important to study what regulations have worked well in the past and what rules could be improved. Using successful regulatory programs as a model for future regulation could reduce the likelihood that a new rule imposes unnecessary costs or leads to unintended consequences.

If the proposed commission is successful, it will identify a range of regulatory programs, and more than likely, a few rules that are duplicative and need to be amended. As then-Administrator Cass Sunstein noted, retrospective review should also focus on "modernizing rules" and consider "the combined effect of their regulations."[10]

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[6] American Action Forum, "The Consumer Price of Regulation," available at http://americanactionforum.org/research/the-consumer-price-of-regulation.
[7] American Action Forum, "An Insight Look at Greenhouse Gas Regulation," available at http://americanactionforum.org/insights/an-inside-look-at-greenhouse-gas-regulation.
[8] Department for Business and Innovation Skills, "The Seventh Statement of New Regulation," available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/271446/bis-13-p96b-seventh-statement-of-new-regulation.pdf.
[9] American Action Forum, "Can a Paperwork Budget Trim Red Tape," available at http://americanactionforum.org/research/can-a-regulatory-budget-trim-red-tape.
[10] OMB Memorandum M-11-10, available at http://www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-10.pdf.

II. Failure of Past Regulatory Reform

The calls for regulatory reform might grow old to some familiar with political and policy dialogue. There have been multiple attempts to address regulatory duplication and the regulatory process. Through the Paperwork Reduction Act (PRA), the Congressional Review Act (CRA), or the half-a-dozen executive orders promoting reform, agencies nevertheless routinely ignore or violate these measures.

For example, every year OIRA publishes its Information Collection Budget of the U.S. Last year, OIRA reported 282 violations of the PRA; the Department of Health and Human Services (HHS) committed 80 violations.[11] Any agency that violates the law more than 25 times receives a "Poor" rating from OIRA. HHS has received a "Poor" rating every year since FY 2009. Furthermore, OIRA included no specific discussion of HHS in its section on "Steps to Improve Agency Compliance."

Violations of the PRA are hardly a recent concern. When it was initially passed, OIRA set a government-wide goal for reducing paperwork burdens by 10 percent in FYs 1996 and 1997, with a five percent target during the next four fiscal years.[12] As the graph on cabinet-level burdens reveals, agencies did not come close to meeting those metrics. Instead of a 35 percent reduction of 4.6 billion hours, agencies increased burdens by 17 percent.

Likewise, agencies routinely fail to follow the CRA. In a recent report from the Administrative Conference of the United States, Curtis Copeland found 43 major and significant rules that were never submitted to Congress or the Government Accountability Office, as the CRA requires.[13] In fact, the report found in 2012, "[F]ederal agencies published a total of 3,714 final rules in the *Federal Register*, but the GAO database indicates that only 2,660 of those rules were submitted (71.6%)." A grade of "D" should not be the standard for agencies complying with the law. Regulators expect 100 percent compliance from the companies they regulate and taxpayers should expect 100 percent compliance from their regulatory agencies following the law.

Compliance with reform also fails with respect to executive orders. When President Obama issued Executive Order 13,563, he embraced the ideal that the nation's regulatory system should "protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation."[14] There have been successful strides under EO 13,563 to remove redundant regulations and cut costs, but they are often in fits and starts, without a true "culture of retrospective review."[15]

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[11] American Action Forum, "Delays, Mistakes, and Violations: A Review of OMB's Information Collection Budgets," available at http://americanactionforum.org/insights/delays-mistakes-and-violations-a-review-of-ombs-information-collection-budg.

[12] Congressional Research Service, "Paperwork Reduction Act (PRA): OMB and Agency Responsibilities and Burden Estimates," available at http://nyti.ms/1BW2rZ2.

[13] Administrative Conference of the United States, "Congressional Review Act: Many Recent Final Rules Were Not Submitted to GAO and Congress," available at https://www.acus.gov/sites/default/files/documents/CRA%2520Report%25200725%2520%25282%2529.pdf.

[14] Exec. Order 13,563, available at https://www.federalregister.gov/executive-order/13563.

[15] OMB Memorandum M-11-19, available at http://www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-19.pdf.

There have been notable rulemakings that examined past regulations and reduced costs while still protecting public health. For example, the Department of Transportation (DOT) finalized a rule to drastically reduce the amount of paperwork truck drivers file under "Driver-Vehicle Inspection Reports."[16] By only requiring reports after an incident, as opposed to a routine trip, DOT plans to save the industry more than $1.7 billion annually and reduce 46.6 million paperwork burden hours, or roughly 15 percent of DOT's total burden.

However, there are only a handful of these notable rules, and they are dwarfed by the 3,000 other rules regulators issue annually. Examining the most recent retrospective review reports from the administration reveals that many agencies treat these reports as just another Unified Agenda. Many of the rules fail to look back at past regulatory programs. Instead, they implement parts of the Affordable Care Act (ACA) or other recent legislation. It is no surprise the administration is implementing the ACA, but it should not label these new regulations as "retrospective."

The Department of Energy (DOE) is a main culprit in this exercise. In one of its recent retrospective review updates, DOE included 19 "retrospective" rulemakings; six of these are new energy efficiency measures that increase costs. They do not examine previous regulations and they do not address redundancy. Combined, DOE's retrospective report adds more than $17.7 billion in cumulative costs and 60,200 paperwork burden hours. The agency failed to quantify a single measure that would reduce costs.

The Department of Education also manipulates its retrospective reports by including new measures that don't look back at existing regulations. Instead, the agency's report included the controversial "Gainful Employment" rule that adds $433 million in annual costs and 6.9 million paperwork burden hours.[17] In addition, the rule projects that more than 110,000 students would drop out of secondary education because of the regulation.

The chart below displays the steady growth of Education paperwork since 2005. The agency's paperwork burden has more than doubled. Not surprisingly, general administrative staff at postsecondary institutions grew 31.5 percent in the last decade, with a 32.8 percent increase in compliance officer employment.[18] A recent bipartisan Senate report on the regulation of postsecondary institutions found, "[A]pproximately 11 percent, or $150 million, of Vanderbilt's 2013 expenditures were devoted to compliance with federal mandates."[19] Through two administrations, each with similar executive orders on regulatory reform, neither has been able to slow the steady rise of new requirements.

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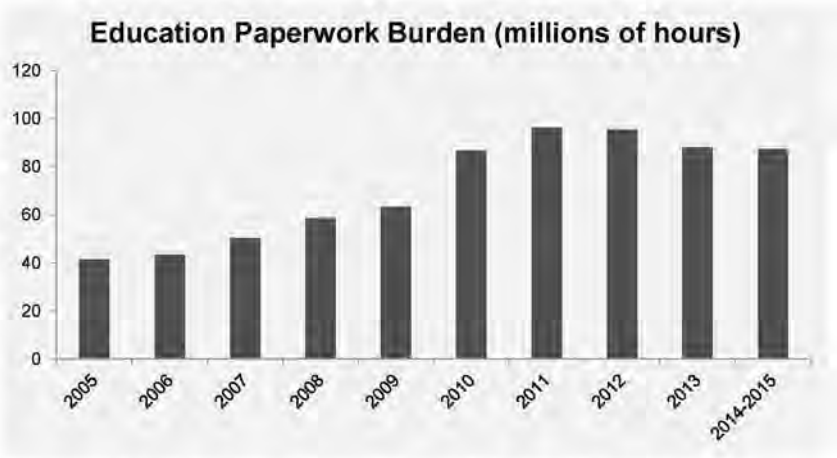
[16] 79 Fed. Reg. 75,437 (December 18, 2014).
[17] American Action Forum, "Revised Gainful Employment Final Rule," available at http://americanactionforum.org/regulation-review/revised-gainful-employment-final-rule.
[18] American Action Forum, "Rising Tide of Education Rules Increase Costs," available at http://americanactionforum.org/research/rising-tide-of-education-rules-increase-costs.
[19] U.S. Senate Committee on Health, Education, Labor and Pensions, "Recalibrating Regulation of Colleges and Universities," available at http://www.help.senate.gov/imo/media/Regulations_Task_Force_Report_2015_FINAL.pdf.



Fundamental reform that thoroughly examines the cumulative stock of regulations while providing flexibility to agencies is vital to ensuring continued economic success. Both of the proposed bills today will take important steps toward reforming the rulemaking process and addressing regulatory accumulation.

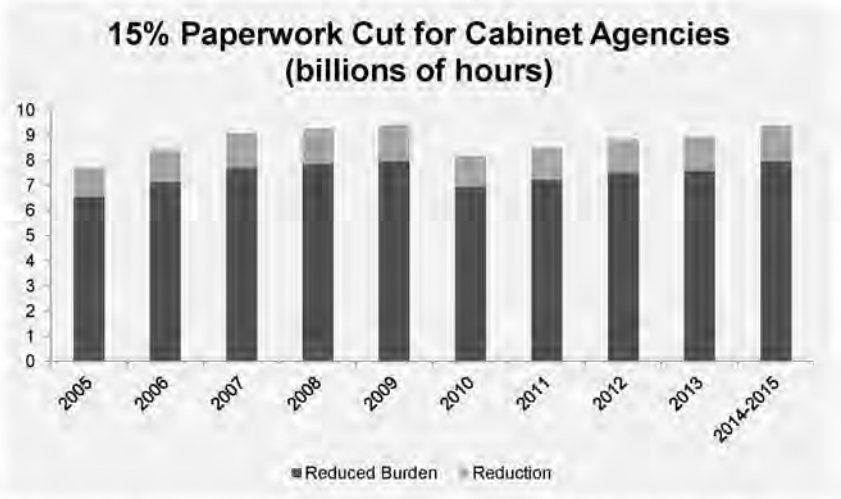
III. Benefits of Reform Legislation

There are obvious benefits to codifying retrospective review and increasing transparency in the sue and settle environment. The first windfall is permanency. Executive orders are temporary and could easily wither with new administrations. However, a commission designed to evaluate cumulative regulatory burdens would have the backing of strong legislation that could last beyond just a single administration, regardless of political party. With the start of every administration, there are campaigns to abolish the internationally recognized concept of cost-benefit analysis, but these reform bills would add needed permanency to the regulatory process.

Second, there are significant regulatory cost and paperwork savings that could be achieved if the legislation works as intended. For example, the SCRUB Act sets a goal "to achieve a reduction of at least 15 percent in the cumulative costs of federal regulation." There are two ways to quantify this 15 percent goal. First, we can look broadly at cumulative regulatory burdens, as represented in paperwork. Currently, the federal government imposes 9.9 billion hours of paperwork.[20] Assuming the independent commission that SCRUB establishes reaches its goal, Americans could expect to save almost 1.5 billion hours of time.

[20] Office of Information and Regulatory Affairs, "Government-Wide Totals for Active Information Collections," available at http://www.reginfo.gov/public/do/PRAReport?operation=11.

The graph below displays the last ten years of cabinet-level paperwork burdens and what a 15 percent reduction would look like historically. During the ten-year period, 15 percent annual reductions would have saved 13 billion hours cumulatively.



The magnitude of 13 billion hours cannot be overstated. For perspective, the entire U.S. Individual Income Tax generates 2.6 billion hours of paperwork annually. If we were to quantify the savings, there are two main metrics: the hourly cost of a regulatory compliance officer ($32.10) and Gross Domestic Product (GDP) per hour worked ($60.59 in 2011 dollars). Assuming the compliance officer figure, 1.5 billion hours translates to $48.1 billion in regulatory savings. That figure is larger than the GDP of Paraguay. Assuming GDP per hour worked, this figure yields more than $90.8 billion in possible savings.

The second method for quantifying SCRUB savings derives from a more recent sample of regulation. Based on AAF's regulatory data since 2008, the average annual cost of regulation during that time is $15 billion. If SCRUB achieves its savings goal, Americans can expect $2.25 billion in annual savings. That might seem like a small figure, but if we assume those cost reductions remain constant during the next ten years, savings could eclipse $22 billion.

These figures are meant to be illustrative, not definitive. Much of the ultimate savings depends on the work of the commission and their staff. Regardless of the estimate, the ranges presented here represent a tremendous opportunity to eliminate redundant regulations and save American consumers from higher costs.

For sue and settle reform, there is a clear record of rules with a judicial deadline that OIRA approved in recent years. According to AAF research, there have been 25 "economically

significant" regulations with a judicial deadline from January 2009 to January 2015, but only 21 monetized costs or benefits. Combined, these rules generated $23.9 billion in annual costs and 5.7 million paperwork burdens hours. For perspective, there were 19 significant final rules with a judicial deadline during a similar period (2004 to 2009) from the last administration.

If the Sunshine for Regulatory Decrees and Settlements Act is adopted, it wouldn't necessarily wipe away the costs and benefits of past regulation, but the figures above do highlight the impact of these rulemakings, which extend beyond just EPA measures. A recent GAO report noted the somewhat limited nature of sue and settle lawsuits, but the report itself was limited, focusing only on EPA.[21] Seven of the rules in our sample were from DOE and one was from DOT. These eight rules had a combined annual burden of $3.4 billion, yet GAO did not cover these figures in its report.

Furthermore, the report did note that more than a quarter of all major EPA rules were prompted by special interest lawsuits, hardly a trivial figure. We should not be surprised that the issue of sue and settle is increasing in importance because EPA admits that it has not complied with 57 risk and technology reviews, as required by federal law. Increasing additional transparency in the process could allow for greater public participation and an identification of the significant economic burdens outlined here.

In sum, the proposed legislation addresses cumulative regulatory burdens without significantly constraining the current work of agencies. The independent commission would provide a legislative solution to regulatory accumulation and sue and settle reform could increase transparency into a process that many view as opaque.

IV. Conclusion

In 2011, President Obama pledged to "remove outdated regulations that stifle job creation and make our economy less competitive."[22] He conceded that past reform attempts didn't deliver on promised benefits and that regulation can harm economic growth. Today, we should strive to codify a system that remedies regulatory accumulation and increases transparency. Successful reform could save billions of dollars in costs and 1.5 billion paperwork hours.

Thank you. I look forward to answering your questions.

[21] Government Accountability Office, "Impact of Deadline Suits on EPA's Rulemaking is Limited," available at http://www.gao.gov/assets/670/667533.pdf.
[22] Wall Street Journal, "Toward of 21st-Century Regulatory System," available at http://www.wsj.com/articles/SB10001424052748703396604576088272112103698.

Mr. MARINO. Dr. McLaughlin.

TESTIMONY OF PATRICK A. McLAUGHLIN, Ph.D., SENIOR RESEARCH FELLOW, MERCATUS CENTER AT GEORGE MASON UNIVERSITY

Mr. MCLAUGHLIN. Chairman Marino, Ranking Member Johnson and Members of the Committee, thank you for inviting me.

As an economist and senior research fellow at the Marcatus Center at George Mason University, my primary research focuses on regulatory accumulation legislation and the regulatory process so it is my pleasure to testify on today's topic.

In previous testimony, I have highlighted the fact that regulatory accumulation creates substantial drag on the economic growth by impeding innovation and entrepreneurship. Today, I have two other points that may happen help in examining the reforms under consideration.

First, I will discuss the affects of regulatory accumulation or to put it another way, why retrospective analysis of regulations can result in what amounts to a tax refund with benefits going largely to lower income Americans.

My second point is that not all attempts at regulatory reform are equal. Several factors tend to contribute to meaningful and successful regulatory reform efforts. The most important of these is the use of an independent body to identify regulations that need to be modified or eliminated. Any retrospective analysis efforts that leaves this task in the hands of the same agencies that created the regulations in the first place is unlikely to succeed.

Regulations can be regressive, particularly in their affects on the prices paid by consumers. A regressive regulation is one whose burden disproportionately falls on lower-income individuals and households. When regulations force producers to use more expensive production processes, some of those production cost increases are passed along to consumers in the form of higher prices. For example, in 2005 the Food and Drug Administration banned the use of chlorofluorocarbons as propellants in medical inhalers, like the inhalers millions of Americans use to treat asthma. Since then the average price of inhalers has tripled. While individuals with high incomes might be able to absorb this price increase, people with low incomes may have to choose not to buy an inhaler and instead leave the asthma untreated.

The cumulative costs of regulations amounts to a hidden regressive burden, but it is a burden that could be lightened. In fact, one way of viewing that burden is as an opportunity, retrospective analysis that eliminates a portion of the regulatory cost burden would act like a progressive tax refund. Let me explain with an example. The regulatory cost burden can be viewed as a tax form by all households. For illustrative purposes, suppose the regulatory cost burden equals about $8,000 per household.

Now consider a regulatory reform that would reduce this cost burden by 15 percent, which would be $1,200 per household per year, this is effectively an annual regulatory cost refund.

This reduction in regulatory burden would have a much larger affect on the purchasing power of the low-income household than the high-income end household. To the low-income household the

regulatory cost refund would equal nearly 5 percent of 1 year's household income. To the high income household, it would equal only.4 percent of 1 year's income. This shows that a regulatory cost refund of any amount would work just like a progressive tax cut. Even better, unlike one-time tax rebates this regulatory cost refund would repeat year after year.

So what makes for a successful retrospective analysis? I discuss several key factors for success in my written testimony as well as in my research and I would like to highlight just two of them here today. First, we need to establish criteria for identifying unwanted regulations, I suggest a test of whether a regulation is functional.

Functional rules address current significant risks, mitigate some amount of those risks and do not have significant unintended consequences or excessive compliance costs relative to their benefits, non functional rules are missing one or more of these features.

The key to achieving significant improvement of the problem of regulatory accumulation is first identifying as many nonfunctional rules as possible and then either eliminating them or changing them so that they become functional.

Second, the task of identifying nonfunctional rules should be placed in the hands of an independent body. The reason for that is to achieve as objective an assessment as possible. If the body tasked with the analysis of a rule has incentive to find that the rule is functional or has insensitive to find that it is non functional, the review risks becoming exercise in advocacy rather than an objective analysis. This is a primary reason why I recommend that retrospective analysis of regulations should not be left in the hands of agencies that have incentives find specific results. We should not expect agencies to give any better assessment of their own rules than professors would expect of students grading their own tests students.

In conclusion, regulatory accumulation with its adverse impact on economic growth by impeding innovation and entrepreneurship is now a widely recognized problem. Furthermore, the costs of regulation are disproportionately born by low income households. Retrospective analysis of regulations is an opportunity to improve our economy to facilitate innovation and to create a progressive regulatory cost refund. Thank you, and I would be happy to answer any questions.

Mr. MARINO. Thank you.

[The prepared statement of Mr. McLaughlin follows:]*

***Note:** Supplemental material submitted with this witness statement is not included in this printed record but is on file with the Subcommittee and the statement can be accessed, in its entirety, at:

http://docs.house.gov/meetings/JU/JU05/20150302/103063/HHRG-114-JU05-Wstate-McLaughlinP-20150302.pdf.

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TESTIMONY

REGULATORY REFORM CAN AMOUNT TO A PROGRESSIVE TAX REFUND, IF DONE RIGHT

BY PATRICK A. McLAUGHLIN
Senior Research Fellow, Mercatus Center at George Mason University

Committee on the Judiciary

Subcommittee on Regulatory Reform, Commercial and Antitrust Law

Legislative Hearing on H.R. 348, the "Responsibly and Professionally Invigorating Development Act of 2015" (RAPID Act); H.R. 712, the "Sunshine for Regulatory Decrees and Settlements Act of 2015"; and H.R. _____, the "Searching for and Cutting Regulations That Are Unnecessarily Burdensome Act of 2015" (SCRUB Act)

March 2, 2015

INTRODUCTION

Chairman Marino, Ranking Member Johnson, and members of the committee: thank you for inviting me to testify today. As an economist and senior research fellow at the Mercatus Center at George Mason University, I focus my primary research on regulatory accumulation and the regulatory process, so it is my pleasure to testify on today's topic.

In previous research and testimony, I have highlighted the fact that regulatory accumulation creates substantial drag on economic growth by impeding innovation and entrepreneurship.[1] Today, I have three main points that may help you to examine the reforms under consideration. First, I will discuss the regressive effects of regulatory accumulation—or, to put it another way, why retrospective analysis of regulations can result in a what amounts to a progressive tax refund, with benefits going largely to lower-income Americans.

1. Patrick A. McLaughlin, "The Searching for and Cutting Regulations That Are Unnecessarily Burdensome Act of 2014" (Testimony before the House Committee on the Judiciary, Subcommittee on Regulatory Reform, Commercial, and Antitrust Law, Mercatus Center at George Mason University, Arlington, VA, February 11, 2014), http://mercatus.org/publication/searching-and-cutting-regulations-are-unnecessarily-burdensome-act-2014; Patrick A. McLaughlin and Robert Greene, "The Unintended Consequences of Federal Regulatory Accumulation," Economic Perspectives, Mercatus Center at George Mason University, May 8, 2014, http://mercatus.org/publication/unintended-consequences-federal-regulatory-accumulation.

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Second, I will highlight how an increasingly long and complex regulatory code can actually make the task of achieving risk reduction in the workplace more difficult.

Third, I will argue that not all attempts at regulatory reform are equal. In my research, I have found several factors that tend to contribute to meaningful and successful regulatory and governmental reform efforts. The most important of these is the use of an independent group or commission to identify regulations that need to be modified or eliminated. Any retrospective analysis effort that leaves this task in the hands of the same agencies that created the regulations in the first place is unlikely to succeed. I highlight some other important principles as well, but the independence of the reviewers is the most important.

REGRESSIVE EFFECTS OF REGULATIONS

Regulations can be regressive, particularly in their effects on prices paid by consumers.[2] A regressive regulation is one whose burden disproportionately falls on lower-income individuals and households. When regulations force producers to use more expensive production processes or inputs, some of those production cost increases are passed along to consumers in the form of higher prices. For example, in 2005, the Food and Drug Administration banned the use of chlorofluorocarbons as propellants in medical inhalers, such as the inhalers that millions of Americans use to treat asthma.[3] This ban was enacted because of environmental concerns rather than health or safety concerns. Since the implementation of that ban, the average price of asthma inhalers has tripled.[4] While individuals with high incomes might be able to absorb this price increase, the higher price may force people with low incomes to make the choice not to buy an inhaler and instead leave the asthma untreated—potentially leading to a real human cost if the person suffers an asthma attack without an inhaler available.

When regulations cause the prices of goods and services to increase, lower-income households have to make a choice: no longer buy those goods, substitute them with something else if possible, or buy less of the more expensive good. This can have the unintended consequence of causing lower-income families not to be able to purchase some good or service that is a medical necessity or that would have reduced the risk of accidental death or injury. I have attached a study by economist Diana Thomas that gives more details on the regressive effects of regulations.

The cumulative cost of regulations amounts to a hidden, regressive burden. But it's a burden that could be lightened. In fact, one way of viewing that burden is as an opportunity: retrospective analysis that eliminates a portion of the regulatory cost burden would act as a progressive tax refund. Let me explain with an example that will illustrate how reducing the regulatory burden is similar to a tax refund that primarily benefits poorer Americans.

While economists have not yet reached consensus on how to calculate the total cost of regulation, several estimates exist. For example, economists John Dawson and John Seater estimate that regulatory accumulation slows economic growth by about 2 percent per year.[5] The latest OIRA report to Congress on the benefits and costs of regulations estimates that a small subset of regulations reviewed cost the economy between $57 billion and $84 billion in 2001 dollars.[6] Converted to 2014 dollars, this range is from $76.19 billion to $112.29 billion.[7] At the other

2. Diana Thomas, "Regressive Effects of Regulation" (Working Paper No. 12-35, Mercatus Center at George Mason University, Arlington, VA, November 2012), http://mercatus.org/publication/regressive-effects-regulation.
3. Department of Health and Human Services, Food and Drug Administration, Use of Ozone-Depleting Substances; Removal of Essential-Use Designations, 70 Fed. Reg. 17168 (April 4, 2005).
4. Laurie Tarkan, "Rough Transition to a New Asthma Inhaler," *New York Times*, May 13 2008, http://www.nytimes.com/2008/05/13/health/13asth.html?_r=0.
5. John W. Dawson and John J. Seater, "Federal Regulation and Aggregate Economic Growth," *Journal of Economic Growth* 18, no. 2 (2013): 137–77.
6. Office of Management and Budget, *2014 Draft Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities*, 2014, http://www.whitehouse.gov/sites/default/files/omb/inforeg/2014_cb/draft_2014_cost_benefit_report-updated.pdf.
7. Converted to 2014 dollars using the Bureau of Labor Statistics CPI Inflation Calculator: http://data.bls.gov/cgi-bin/cpicalc.pl.

end of the spectrum, Clyde Wayne Crews estimates the annual cost of regulations to be around $1.882 trillion.[8] For this example, I'll use the midpoint between $57 billion and $1.882 trillion, which is $969 billion. Consider this the annual regulatory burden shared across all households in the economy. As of 2013, there were 115,610,216 households in the United States. We can estimate the regulatory burden per household by simply dividing the midpoint cost estimate, $969 billion, by the number of households. This division yields about $8,386 per household.

Now consider a regulatory reform that would reduce this cost burden by 15 percent. If the regulatory cost burden per household is $8,386, then a 15 percent reduction would equal about $1,258 per household per year. This reduction in cost burden is effectively an annual regulatory cost refund and would have different impacts to low-, middle-, and high-income households. In this example, I define a low-income household as a family of five with three children under the age of 18 earning a household income exactly equal to the Census poverty threshold for 2014: $28,252. For the middle-income household, I use the median household income in 2013 (the latest year available): $51,900. For the high-income household, I follow Diana Thomas's calculations and use a household income equal to 10 times the poverty threshold: $282,520. Table 1 shows what a reduction in regulatory costs of $1,258 would equal, relative to household income and in percentage terms.

Table 1. A Regulatory Cost Refund Relative to Household Income across Income Groups

Household	Household income	Cost reduction	Percentage of income
Low-income	$28,252	$1,258	4.5%
Middle-income	$51,900	$1,258	2.4%
High-income	$282,520	$1,258	0.4%

As table 1 shows, a reduction in regulatory burden of $1,258 would have a much larger effect on the purchasing power of the low-income household than the middle- or high-income households. To the low-income household, the regulatory cost refund would equal nearly 5 percent of one year's household income. Conversely, to the high-income household, it would equal only 0.4 percent of one year's income. This example shows that a regulatory cost refund of any amount would work just like a progressive tax cut, helping low- and middle-income households relatively more than high-income households. Even better, unlike one-time tax rebates, this regulatory cost refund would repeat every year.

INCREASING INABILITY TO PRIORITIZE COMPLIANCE

One concern that accompanies regulatory accumulation is called regulatory overload. Firms are compelled by law to comply with regulations, regardless of whether the regulations are effective at solving a particular problem. In a 2011 study, psychologist Andrew Hale and his coauthors find that as the number of rules increase, the rules themselves become less effective.[9] They also find that as the number of rules increase, companies tend to rely on more rigid, checklist-style compliance strategies to ensure compliance with the letter of the law rather than proactive risk management strategies that may be more effective at reducing health and safety risks in the workplace. They call these problems regulatory overload.

Certainly, as regulations accumulate, risk managers' attention will be spread across a greater number of rules. If any of those rules are not actually effective in reducing risk, the attention paid to those rules will detract from compliance with functional rules.

8. Clyde Wayne Crews Jr., "Tip of the Costberg: On the Invalidity of All Cost of Regulation Estimates and the Need to Compile Them Anyway," 2015 ed. (working paper, Competitive Enterprise Institute, Washington, DC, 2015).
9. Andrew Hale, David Borys, and Mark Adams, "Regulatory Overload: A Behavioral Analysis of Regulatory Compliance" (Working Paper No. 11-47, Mercatus Center at George Mason University, Arlington, VA, November 2011), http://mercatus.org/publication/regulatory-overload.

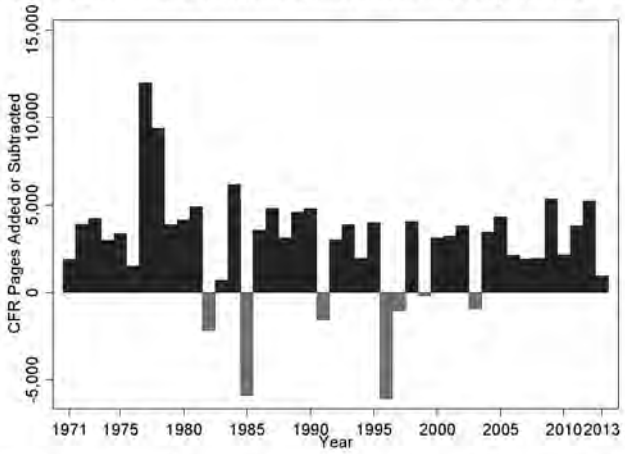
PRINCIPLES FOR SUCCESSFUL REFORM

As I have previously testified,[10] the need to eliminate or modify nonfunctional regulations from the accumulated stock has been widely recognized by members of Congress and every president since Carter.[11] Functional rules address current, significant risks; mitigate some amount of those risks through compliance with the regulations; and do not have significant unintended effects or excessive compliance costs relative to their benefits. Nonfunctional rules are missing one or more of these features. The key to achieving significant amelioration of the problem of regulatory accumulation is first identifying as many nonfunctional rules as possible and then either eliminating them or changing them so that they become functional.

Executive branch attempts to examine and revise or eliminate existing nonfunctional regulations have primarily relied on executive orders for review of the need for regulations rather than creating a streamlined and evidence-based, analytical process that could accomplish large-scale reform. In a 2014 study I coauthored with economist Richard Williams (attached), we examine previous efforts at regulatory reform led by every president since Reagan and conclude that these episodes yielded only marginal improvements at best. Most notably, none of these efforts resulted in either substantial reductions relative to the total size of the *Code of Federal Regulations* (CFR) or sustained changes in the rate of adding new regulations to the CFR.[12]

Figure 1 shows just how little the regulatory process has changed, despite these presidential efforts. Since 1975, the CFR has expanded in 30 of 37 years. In those 30 expansionary years, 117,294 pages were added to the CFR. In contrast, in the seven contractive years, 17,871 pages were subtracted from the CFR—for net growth of nearly 100,000 pages. Previous efforts to eliminate obsolete regulations have removed only very small percentages of existing regulations from the books.

Figure 1. Pages Added to or Subtracted from the *Code of Federal Regulations*, 1976–2012



10. McLaughlin, "Searching for and Cutting Regulations That Are Unnecessarily Burdensome Act of 2014."
11. Michael Mandel and Diana G. Carew, "Regulatory Improvement Commission: A Politically-Viable Approach to U.S. Regulatory Reform" (Policy Memo, Progressive Policy Institute, Washington, DC, May 2013), 3–4, http://www.progressivepolicy.org/2013/05/regulatory-improvement-commission-a-politically-viable-approach-to-u-s-regulatory-reform/.
12. Patrick A. McLaughlin and Richard Williams, "The Consequences of Regulatory Accumulation and a Proposed Solution" (Working Paper 14-03, Mercatus Center at George Mason University, Arlington, VA, February 2014), http://mercatus.org/publication/consequences-regulatory-accumulation-and-proposed-solution.

The failure of past regulatory review efforts likely stems from a fundamental misalignment of incentives: agencies, despite direction from the president, have incentives to maintain and increase their regulations to maximize their budgets and control over their portion of the economy. In turn, to retain regulations that would be eliminated otherwise, agencies may either hide or fail to produce information that would help identify obsolete or ineffective regulations in the first place. We should not expect agencies to give any better assessments of their own rules than professors would expect of students grading their own tests.

Similarly, individuals in agencies have little incentive to provide information that would lead to a rule's elimination or the choice not to produce a rule.[13] In general, employees—including economists—are professionally rewarded for being part of teams that create new regulations or expand existing regulatory programs.[14] Conversely, employees are rarely rewarded for deciding that a regulation should not be created. This is unfortunate, because specialists in agencies are likely to have some relevant information about which rules are nonfunctional.

However, the issues that have plagued previous, executive branch–led efforts at regulatory reform can be overcome. In previous research, I identified 11 characteristics of successful regulatory reform, derived from lessons learned by studying the Base Realignment and Closure (BRAC) process, regulatory reform in other countries, and previous attempts at retrospective review in the United States.[15] I highlight a few of these below, for the purposes of assessing the reforms currently under consideration.

1. The process of identifying rules for modification or elimination should entail *independent* assessment of whether regulations are functional.

To be classified as functional, a rule must

1. address a current risk,
2. address a significant risk,
3. not result in ongoing costs (including unintended consequences) that more than offset the ongoing benefits of the rule, and
4. not interfere with or duplicate other rules.

It is vital that the assessment of a rule with respect to each of these criteria be performed objectively. If the body tasked with the analysis of a rule has incentive to find that the rule is functional or is nonfunctional, the review risks becoming an exercise in advocacy rather than objective analysis. The SCRUB Act, for example, creates a commission with the authority to hire analysts and experts necessary for such an assessment and to collect essential information for those purposes. The SCRUB Act sets forth criteria for regulatory assessment that are not very different from how I define "nonfunctional" rules in my own research. While it is wise to build in flexibility for the commission to devise new criteria in response to future lessons learned, it is equally important that any commission be required to publicly disclose its complete assessment criteria and take comments from the public on them.

2. The identification process must be broad enough to identify potentially duplicative regulations.

Duplication and redundancy across agencies may be a large source of nonfunctional rules. For example, multiple agencies through different regulations may address food safety. In light of this source of nonfunctional rules, analysis that is focused on individual rules or the rules of a single agency may not capture factors (e.g., conflicts, duplication) that indicate certain rules are in fact nonfunctional.

13. McLaughlin and Williams, "Consequences of Regulatory Accumulation."
14. Richard Williams, "The Influence of Regulatory Economists in Federal Health and Safety Agencies" (Working Paper No. 08-15, Mercatus Center at George Mason University, Arlington, VA, July 2008), http://mercatus.org/publication/influence-regulatory-economists-federal-health-and-safety-agencies. Williams quotes one economist as saying, "Success is putting out 10 regulations a year and bigger regulations are bigger successes."
15. McLaughlin and Williams, "Consequences of Regulatory Accumulation."

3. The analysis of the functionality of rules should use a standard method of assessment that is difficult to subvert.
Nobel Prize–winning economist Ronald Coase famously said, "If you torture the data long enough, it will confess to anything." So it goes with any analysis: those who perform the analysis can choose the data to examine, how to analyze them, and the framework within which to present results. This is a primary reason why I recommend that retrospective analysis of regulations not be left in the hands of agencies that have incentive to find specific results.

However, a similar logic applies to an independent body that analyzes regulations. In the long run, we would have to worry about whether the body can maintain its independence and whether political or other pressure would be exerted on the body to subvert its analyses to serve an agenda. The best way to prevent such subversion is to require a simple, transparent, and replicable methodology of assessment.

Under the SCRUB Act, the commission is required to specify a methodology for assessment. Doing so publicly and before beginning the assessment will help achieve a transparent, objective end product.

4. Whatever the procedure for assessment, assessments of specific regulations or regulatory programs should focus on whether and how they lead to the outcomes desired.
The SCRUB Act lists as one of the criteria for assessment "whether the rule or set of rules is ineffective at achieving the rule or set's purpose." To meet my criteria, this phrase should mean achieving desired *outcomes*, as opposed to producing *outputs*. A rule may lead to an increase in an output, such as increased safety inspections, but that does not guarantee that there has been an increase the outcome, safety.

5. Congressional action—such as a joint resolution of disapproval—should be required to stop the recommendations, as opposed to a vote to enact or not enact.
The SCRUB Act could be improved if it were modified to limit formally Congress's ability to subvert the process of selecting rules for elimination or modification. As the creators of the BRAC process recognized, every base targeted for closure had a champion defending it in Congress: the member whose constituency would be affected by the closure. So it would likely be with regulations slated for revocation. A better solution would be to follow the BRAC experience and require that a SCRUB Act commission's recommendations take effect automatically unless Congress were to enact a joint resolution of disapproval of the entire set of recommendations—with no amendments allowed.

6. The review process should repeat indefinitely.
The SCRUB Act provides for a dissolution of the commission by a specific date. Given the possibility that the commission cannot evaluate all regulations before that date, it may be worthwhile to extend the life of the commission until all regulations are evaluated at least once, or even have the commission continue on an ongoing basis. The regulatory process will lead to regulatory accumulation again. This commission could balance the tendency to accumulate regulations with a deliberate and streamlined process for eliminating nonfunctional regulations if and when they appear.

CONCLUSIONS

Regulatory accumulation in the United States, with its adverse impact on economic growth by impeding innovation and entrepreneurship, is now a widely recognized problem. Furthermore, the costs of regulation are disproportionately borne by low-income households and the accumulation of regulations may make us less safe overall as compliance becomes more thinly spread between functional and nonfunctional rules. Regulatory reform that reduces the overall burden of regulations would act as a progressive tax refund for American households. Nonetheless, the problem has not been meaningfully addressed despite the efforts of several administrations.

One reason it has been hard to address regulatory accumulation is the difficulty of identifying nonfunctional rules—rules that are obsolete, unnecessary, duplicative, or otherwise undesirable. An independent group or commission—not regulatory agencies—seems required to successfully identify nonfunctional rules.

The SCRUB Act has several characteristics that make it more likely to succeed where previous attempts have failed. First, it appoints an independent commission to identify nonfunctional rules. Second, the act requires that the commission establish a methodology before beginning the assessment of rules, thereby minimizing opportunities for the assessment to be subverted by special interests. Third, the act establishes criteria that the commission would use to identify nonfunctional rules, and these criteria are primarily based on fundamental problem-solving and sound economic thinking.

Mr. MARINO. And sir, again I want to be sure I'm pronouncing you name correctly, is it Narang.

Mr. NARANG. It's Narang.

Mr. MARINO. Narang.

Mr. NARANG. Although you give it a much better first try than most.

Mr. MARINO. Narang, okay. Mr. Narang, would you please give your opening statement.

And I apologize.

TESTIMONY OF AMIT NARANG,
REGULATORY POLICY ADVOCATE, PUBLIC CITIZEN

Mr. NARANG. Chairman Marino, Ranking Member Johnson and Members of the Subcommittee, thank you for the opportunity to testify today on the three legislative proposals that are the subject of today's hearing.

I am Amit Narang, regulatory policy advocate of Public Citizen's Congress Watch. Public Citizen is a national public interest organization with more than 350,00 members and supporters. For more than 40 years we have successfully advocated for stronger health, safety, consumer protection and other rules, as well as for a robust regulatory system that curtails corporate wrongdoing and advances the public interest.

I'd like to first address the proclaimed rationale for this legislation which is the claim that regulations hurt the economy. This rhetoric is simply not supported by reality. All studies that have attempted to demonstrate this falsehood have been thoroughly discredited by credible independent and in certain cases nonpartisan observers such as the Congressional Research Service. None of these studies have been subjected to peer review and none would pass scrutiny under peer review.

I want to focus on one report in particular by the Competitive Enterprise Institute which asserts that regulation costs our economy $1.8 trillion annually, which breaks down to about $15,000 per household. The CEI report is readily cited by lawmakers and by a fellow witness at this hearing written testimony. And yet The Washington Post found the study "misleading" and worthy of two Pinocchios. The reports authors themselves claim it is "not scientific" and "rather back of the envelope."

This report and others relying on similar discredited and methodology can not and should not inform critical policy debates and certainly should not be the primary justification for any legislation.

Turning to the legislation itself, let me start with the SCRUB Act. The SCRUB Act presumes there are volumes of outdated and unnecessary regulations ripe for repeal. But this presumption is problematic given the lack of any concrete and tangible examples of outdated or unnecessary regulations cited by my fellow witnesses in their testimony.

Supporters may point to the Obama administration's retrospective review process as proof that such regulations exist. Actually, this compounds the SCRUB Act's problematic premise. If the Administration has and is continuing to take these regulations off the books, what is there really left for the commission to do?

The commission would be better titled the retrospective regulatory reduction commission since the commission only promotes deregulation with no corollary mission to strengthen regulatory standards that are too weak or identify gaps in our regulatory protections that could prevent the next massive chemical spill like the one we tragically saw occur in West Virginia last year.

This lack of balance carries over to Title II of the bill, which requires agencies to repeal commission identified rules before issuing new ones. Here the repeal of rules would not undergo cost benefit or any regulatory impact analysis nor would the public be allowed to comment both of which would still pertain to the issuance of new rules.

Potentially even more troubling in this double standard is the lack of any exceptions to one in, one out scheme for emergency rules, addressing urgent public health and safety crisis. This could endanger the public by forcing agencies to repeal rules before they can issue new health and safety regulations to address a public health emergency, such as an Ebola outbreak.

Now let me turn to the Sunshine Act. The Sunshine Act reveals one of the most troubling aspects of our current regulatory system. The fact that agencies routinely miss explicit and mandatory congressional deadlines to issue new rules. One quick glance at Public Citizens' visual depiction of the regulatory process explains why. The current process is a paragon of inefficiency with a maze of redundant requirements for agencies to complete before finalizing any rules. It's no wonder given dwindling resources that agencies often fail to meet congressional deadlines.

Congress should be making it easier to enforce the law when agencies miss congressionally-mandated deadlines. The Sunshine Act unfortunately does the opposite. The GAO's recent report on the so called sue and settle phenomenon put to bed any claims of impropriety in the process. And for the sake of brevity I refer you to my written testimony for a fuller explanation.

Finally, the RAPID Act represents a very different approach to the previous two bills expediting agency action regarding permit approvals for large infrastructure projects including energy projects. It does this by dramatically scaling back the process agencies must undertake for determining the environmental impacts, meaning the costs and the benefits of these—to the environment that such a project would pose.

The National Environmental Policy Act or NEPA requires agencies to conduct this important analysis in order to minimize the environmental footprint of the proposed energy or infrastructure project. In perhaps the most troubling reform, the bill allows project developers themselves to prepare the environmental impact statements, allowing those developers to decide the impact on the environment its own proposed project will have. This is akin to letting, for example, the big banks on Wall Street decide the costs and benefits of new Wall Street reforms.

Finally, it is important to step back and take stock of the stark double standard created by enactment of all three legislative proposals here, along with other so-called regulatory reform measures the House has already passed such as H.R. 185, the "Regulatory Accountability Act."

I am a sports fan and I hope many of you are too, but with apologies to non-sports fans, allow me to use a baseball analogy to illustrate this double standard. In a baseball game each team gets a chance to bat nine times in nine innings, just a little asterisk there, but let's say the rules were changed to allow one team to bat 12 times, and the other team to only bat six times. While this would not ensure that the team that bats more often would always win, it would make it far more likely by making the rules unfairly advantage one team over the other. This unfair advantage due to a double standard in the procedural rules is exactly what will occur by expediting permit approvals to the RAPID Act while further delaying and impeding new rules to protect the public through the Sunshine and SCRUB Acts.

The Chamber of Commerce is explicit about supporting this double standard advocating for one process when agencies approve permits and a very different one when agencies approve new regulatory standards. If the Regulatory Accountability Act "improves the rulemaking process" as the Chamber claims, wouldn't it make sense for the Chamber to support approving permits through that process as well?

Why shouldn't agencies use the same process when establishing measures to protect servicemembers from predatory lending, as they do when approving new permits. By manipulating the process, these legislative measures pick winners and losers thereby making our government work for corporate special interests and against protecting the public.

Thank you and I look forward to your questions.

Mr. MARINO. Thank you.

[The prepared statement of Mr. Narang follows:]

Written Testimony of

Amit Narang
Regulatory Policy Advocate, Public Citizen

before the

The Subcommittee on Regulatory Reform, Commercial and Antitrust Law
U.S. House of Representatives

on

H.R. 348, the "Responsibly And Professionally Invigorating Development Act of 2015" (RAPID Act); H.R. 712, the "Sunshine for Regulatory Decrees and Settlements Act of 2015"; and, H.R. ____, the "Searching for and Cutting Regulations that are Unnecessarily Burdensome Act of 2015" (SCRUB Act)

March 2, 2015

Mr. Chairman and Members of the Committee,

Thank you for the opportunity to testify today on H.R. 348, the "Responsibly And Professionally Invigorating Development Act of 2015" (RAPID Act); H.R. 712, the "Sunshine for Regulatory Decrees and Settlements Act of 2015"; and, H.R. ____, the "Searching for and Cutting Regulations that are Unnecessarily Burdensome Act of 2015" (SCRUB Act)". I am Amit Narang, Regulatory Policy Advocate at Public Citizen's Congress Watch. Public Citizen is a national public interest organization with more than 350,000 members and supporters. For more than 40 years, we have successfully advocated for stronger health, safety, consumer protection and other rules, as well as for a robust regulatory system that curtails corporate wrongdoing and advances the public interest.

Public Citizen co-chairs the Coalition for Sensible Safeguards (CSS). CSS is an alliance of more than 150 consumer, small business, labor, scientific, research, good government, faith, community, health and environmental organizations joined in the belief that our country's system of regulatory safeguards provides a stable framework that secures our quality of life and paves the way for a sound economy that benefits us all. Time constraints prevented the Coalition from reviewing my testimony in advance, and I write only on behalf of Public Citizen.

I. Introduction

Although I present substantive feedback on the three pieces of legislation that are the focus of this hearing later in my testimony, I want to begin by touching on three areas. First, the false claim underlying support for all three of the bills that regulations increase unemployment. Second, the crucial importance of regulations to consumers and working families in their everyday lives. Third, the current problems in the regulatory process that are exacerbated by two of the three bills.

There is simply no credible, independent, and peer-reviewed empirical evidence supporting the claim that there is a trade-off between economic growth and strong, effective regulatory standards. Experts from across the political spectrum have acknowledged that arguments linking regulations to job losses are nothing more than mere fiction. For example, Bruce Bartlett, a prominent conservative economist who worked in both the Reagan and George H.W. Bush administrations, referred to the argument that cutting regulations will lead to significant economic growth as "just nonsense" and "made up."[1]

Mr. Bartlett's claims are backed up by a recent book entitled "Does Regulation Kill Jobs?"[2], a comprehensive empirical study conducted by numerous distinguished academics that closely scrutinized the claim that regulations are linked to job loss and concluded that "to date the

[1] Charles Babington, Bruce Bartlett, Ex-Reagan Economist: Idea That Deregulation Leads to Jobs 'Just Made Up,' Huffington Post, October 30, 2011, http://www.huffingtonpost.com/2011/10/31/gop-candidates-plans-on-economy-housing_n_1066949.html?view=print&comm_ref=false.

[2] CARY COGLIANESE & ADAM M. FINKEL &CHRISTOPHER CARRIGAN, DOES REGULATION KILL JOBS (2013).

empirical work suggests that regulation plays relatively little role in affecting the aggregate number of jobs in the United States."[3] The authors go on to definitively state that "the empirical evidence actually provides little reason to expect that U.S. economic woes can be solved by reforming the regulatory process."[4]

By contrast, the so-called "evidence" that regulations are killing jobs or ruining the economy comes from biased and partisan sources using methodology that is not peer-reviewed and doesn't pass muster under scrutiny. For example, the *Washington Post* recently vetted a report entitled "the Ten Thousand Commandments" from the Competitive Enterprise Institute claiming that the annual regulatory burden adds up to $15,000 for each household in America or 1.8 trillion for the whole country.[5] As the *Post* notes, the report foregoes any attempt at computing the benefits of the regulations it includes and the *Post* found that the report has "serious methodological problems" and deserved "two pinocchios" given that the report's authors themselves admit that the report is "not scientific" and "back of the envelope."[6] Reports using similar methodology and reporting similar figures have also been exposed as flawed and have been disavowed.[7]

To the extent that there is a link between regulations and job losses, it points in the opposite direction with a lack of regulation being the culprit for the financial collapse of 2008 and the ensuing Great Recession. As the Financial Crisis Inquiry Commission noted, ""Widespread failures in financial regulation and supervision proved devastating to the stability of the nation's financial markets."[8] A GAO report quantified the tragic costs of the financial crisis, finding that lost economic output could exceed $13 trillion and that American households collectively lost $9.1 trillion.[9] The lack of demand that drove the mass layoffs can be directly attributed to the economic slowdown following this financial crisis.

Second, the benefits that federal regulations provide to our country consistently dwarf the costs of those regulations according to official government figures. Every year, the Office of Management and Budget (OMB) analyzes the costs and benefits of rules with a major economic impact in a report to Congress. The most recent OMB report found that:

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[3] *Id*. at 7
[4] *Id*. at 10
[5] Glenn Kessler, *The Claim That American Households Have a 15,000 Regulatory 'Burden'*, WASHINGTON POST (Jan 14, 2015) , http://www.washingtonpost.com/blogs/fact-checker/wp/2015/01/14/the-claim-that-american-households-have-a-15000-regulatory-burden/
[6] *Id*.
[7] Mark Drajem, *Rules Study Backed by Republicans 'Deeply Flawed,' Sunstein Says* (Bloomberg, June 3, 2011) *available at* http://www.bloomberg.com/news/2011-06-03/rules-study-backed-by-republicans-deeply-flawed-sunstein-says.html
[8] Financial Crisis Inquiry Commission. (2011). The Financial Crisis Inquiry Report: Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States. Washington, D.C.: Government Printing Office. p. 30.
[9] U.S. Government Accountability Office. (2013, Jan. 13). Financial Crisis Losses and Potential Impacts of the Dodd-Frank Act. p. 12. available at: <http://www.gao.gov/products/GAO-13-180>.

> The estimated annual benefits of major Federal regulations reviewed by OMB from October 1, 2003, to September 30, 2013, for which agencies estimated and monetized both benefits and costs, are in the aggregate between $217 billion and $863 billion, while the estimated annual costs are in the aggregate between $57 billion and $84 billion. These ranges are reported in 2001 dollars and reflect uncertainty in the benefits and costs of each rule at the time that it was evaluated.[10]

This means that even by the most conservative OMB estimates, the benefits of major federal regulations over the last decade have exceeded their costs by a factor of more than two-to-one, and benefits may have exceeded costs by a factor of up to 14.

Yet, the raw numbers do not fully portray the critical role that regulations play in our lives every day. Over the last century, and through the Obama administration, regulations have made our food supply safer; saved hundreds of thousands of lives by reducing smoking rates; improved air quality, protected children's brain development by phasing out leaded gasoline; saved consumers billions by facilitating price-lowering generic competition for pharmaceuticals; reduced toxic emissions into the air and water; empowered disabled persons by giving them improved access to public facilities and workplace opportunities; guaranteed a minimum wage, ended child labor and established limits on the length of the work week; saved the lives of thousands of workers every year; protected the elderly and vulnerable consumers from a wide array of unfair and deceptive advertising techniques; ensured financial system stability (at least when appropriate rules were in place and enforced); made toys safer; saved tens of thousands of lives by making our cars safer; and much more.

While many of us take these regulatory protections as granted, the true value of regulatory standards become tragically apparent following avoidable crises and catastrophes stemming from a lack of regulation. Deregulatory failures such as the aforementioned 2008 financial collapse and Great Recession, the 2010 British Petroleum oil spill disaster in the Gulf of Mexico, the Upper Big Branch mine explosion in West Virginia, the numerous tainted food recalls and food safety crises that still occur on a regular basis, the massive recalls of unsafe children's toys and defective consumer products, and most recently the explosion at a West Texas fertilizer plant, all point to the need to strengthen, not weaken, our system of regulatory protections.

Finally, it is true that the regulatory system is broken, but not because there is too much regulation. Rather the system is broken because the current regulatory process is too slow, too calcified, and too inflexible to respond to public health and safety threats as they emerge. As Public Citizen's striking visual depiction of the regulatory process shows,[11] the current process is a model of inefficiency, with a dizzying array of duplicative and redundant requirements

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[10] Office of Management and Budget, Office of Information and Regulatory Affairs. (2014). Draft 2014 Report to Congress on the Benefits and Costs of Federal Regulations an Unfunded Mandates on State, Local, and Tribal Entities. p.1. available at:

[11] Public Citizen, *The Federal Rulemaking Process*, http://www.citizen.org/documents/Regulations-Flowchart.pdf.

interspersed throughout a byzantine network that is a virtual maze for agencies to navigate. This is the result of an accumulation of analyses and procedures that Congress and the Executive have imposed on agencies over the years leaving agencies in a state of "paralysis by analysis." Far from the popular conception of "regulators run amok," the reality is that agency delays are rampant, deadlines are routinely missed or pushed back, and ample evidence exists that the situation is getting worse.

These delays and missed deadlines are the sign of a broken regulatory system that is crumbling under the cumulative weight of ever increasing analytical and procedural requirements. The next two bills I discuss will make these problems even worse.

II. The Sunshine for Regulatory Decrees and Settlements Act of 2015

Resting on a number of misconceptions, the "Sunshine for Regulatory Decrees and Settlements Act of 2015" (SRDSA), H.R. 712, would represent a breach of the rule of law by perpetuating unlawful actions by federal agencies. This dangerous legislation is founded on a number of false and misleading allegations based on assumptions that federal agencies are colluding with public interest groups to enter into settlement agreements that ultimately result in outcomes preferred by those public interest groups who bring the lawsuit. These settlement agreements have been pejoratively dubbed "sue and settle" agreements by supporters of H.R. 712. I will address these assumptions by drawing upon the findings from the December 2014 Government Accountability Office (GAO) in their report entitled "Impact of Deadline Suits on EPA's Rulemaking Is Limited."[12] The report focuses specifically on the Environmental Protection Agency (EPA) and, it should be noted, was requested by Republican members of the Committee on Energy and Commerce of the House of Representatives including Rep. Fred Upton, Chair of the Committee, and Reps. Ed Whitfield and Tim Murphy, Chairs of the relevant subcommittees.

In correcting the false record of misconceptions advanced by supporters of H.R. 712, the first step is to provide clarity on the substance of the suits that give rise to the untrue allegations of so-called "sue and settle" practices. The aforementioned GAO report terms these lawsuits "deadline suits"[13] because the lawsuits allege that the EPA failed to perform a nondiscretionary, or mandatory, act by a deadline established by Congress. In other words, these lawsuits allege that agencies such as the EPA broke the law by failing to commit a congressionally mandated action by a date established in statute. These lawsuits are among the simplest to understand and prove. To illustrate, if the law says EPA must finalize a rule by March 2nd, 2015 and the EPA does not finalize the rule by that date, third parties are entitled to bring a "deadline suit" to enforce the congressionally mandated deadline. That EPA, working with the Department of Justice (DOJ), seeks to settle these lawsuits instead of going to trial should be obvious and surprise no one. It makes little sense to waste agency, and by extension taxpayer, resources to

[12] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-34, ENVIRONMENTAL LITIGATION: IMPACT OF DEADLINE SUITS ON EPA'S RULEMAKING IS LIMITED (DEC. 2014), *available at* http://www.gao.gov/assets/670/667533.pdf.
[13] *Id.* at 3.

defend against claims that the EPA didn't perform a legal requirement by a congressionally imposed deadline when the parties who are bringing the suit only have to point to the calendar in order to prove their case. In these situations, "it is very unlikely that the government will win the lawsuit" according to the GAO report.[14] Thus, it is entirely sensible for the EPA, in consultation with DOJ, to settle these cases.

The next needed point of clarity is regarding whether such settlements pre-ordain the *substance* of the agency action that the EPA and other agencies agree to finalize under the terms of the settlement. Again, the GAO report here is very clear and the answer is a resounding no. According to the report, "EPA officials stated that they have not, and would not agree to settlements in a deadline suit that finalizes the substantive outcome of the rulemaking or declare the substance of the final rule."[15] This is consistent with a 1986 DOJ memo from President Reagan's Attorney General Edwin Meese which prohibits the EPA from entering into settlement agreements that prescribe specific substantive outcomes regarding final rules. Thus, the allegation that "sue and settle" litigation involves back-room negotiations between pro-regulatory groups and complicit federal agencies which result in agreements that dictate the content of rules or bind agency discretion is patently false and cannot serve as legitimate justification for H.R. 712.

The final point of clarity is with respect to the actual outcome of so-called "sue and settle" litigation since, as has been demonstrated by the GAO, the outcome does not at all dictate the substance of any final rule resulting from a settlement agreement. In short, the settlement agreement that results from a "deadline suit" sets out nothing more than a simple timeline for the agency, the EPA in the GAO report, that has missed a Congressionally mandated deadline to complete the action. If the action is a rule involving rulemaking, the agency must generally follow the traditional public notice and comment rulemaking process prescribed by the Administrative Procedures Act or procedures prescribed by the agency's authorizing statute. In the case of the EPA, all of the settlements scrutinized by GAO pursuant to the EPA's rulemaking authority under the Clean Air Act went through the public notice and comment process allowing all members of the public an opportunity to comment on the rule before it is finalized.[16] Thus, any claims by supporters of H.R. 712 that "sue and settle" litigation and resulting settlement agreements circumvent the normal rulemaking process or somehow deny the public the ability to participate in that process are completely baseless.

Since all of the allegations from supporters of H.R. 712 claiming the existence of collusion or impropriety in reaching settlement agreements under so-called "sue and settle" litigation have been revealed as unsubstantiated, one can only speculate that the true motivation for this legislation stems from opposition to the regulatory action itself, which in the case of the EPA,

[14] *Id.* at 7.
[15] *Id.* at 8.
[16] *Id.* at 12.

more often than not involves air pollution regulations that implement the Clean Air Act. While Congress has multiple remedies available to dispense with regulations it opposes, including repeal of underlying statutes such as the Clean Air Act or repeal of air pollution regulations, H.R. 712 cannot serve this function. Simply put, if supporters of H.R. 712 are unhappy with third parties who exercise their right to force agencies such as the EPA to follow the law, they must seek to change the law itself instead of pursuing a thinly veiled attack on ability of third parties to enforce the law and thereby shutting down implementation of the law.

The existence of missed statutory deadlines is a symptom of a much larger problem that is deeply disconcerting for the public, namely that our regulatory process is broken as I describe earlier in my testimony. The GAO report bears this out with eye-opening examples. For example, the Clean Air Act rules that GAO studied included rules which missed Congressional deadlines by shocking and unacceptable margins. For example, one rule was finally implemented 26 years after the Congressional deadline to finalize the rule.[17] Another missed its deadline by 19 years.[18] A quick review of the rest of the rules paints a sobering picture of significant delay. H.R. 712 would not shorten these delays, it would lengthen them.

III. The Searching for and Cutting Regulations that are Unnecessarily Burdensome Act of 2015

I turn now to the "Searching for and Cutting Regulations that are Unnecessarily Burdensome Act of 2015" or "SCRUB Act of 2015." At the outset, it must be noted that the bill is fashioned to be one-sided in its focus and impact. That is to say, the SCRUB Act only enables the repeal or removal of regulations and ignores the possibility of strengthening ineffective regulations or identifying gaps in our regulatory system that leave the health and financial well-being of consumers and working families at risk. If enacted, this one-sided approach would have real world consequences and is far from a theoretical concern.

On a daily basis, Americans suffer the effects of a lack of adequate protections and safeguards from environmental hazards, unsafe consumer products including products for children, dangerous workplaces, abusive and deceptive financial products and practices, and tainted food just to name a handful. All too often, these gaps in our regulatory system are demonstrated in dramatic and tragic fashion. A little over a year ago, unregulated and little-known chemicals leaked into the Elk River in West Virginia cutting off many communities from a safe water supply, including in the primary business hub of Charleston where small businesses were forced to shut down for days. The culprit was a chemical storage tank owned by now defunct Freedom Industries who was aptly, although presumably coincidentally, named for their "freedom" from any chemical regulations. Likewise, trains carrying highly flammable oil have derailed repeatedly over the past couple years, igniting massive explosions and imperiling communities

[17] *Id.* at 11
[18] *Id.*

that didn't even know such trains passed through their backyards until these tragic incidents occurred.

The SCRUB Act will do nothing to prevent the next oil train explosion or the next massive chemical leak in lakes and rivers that communities rely on for access to clean water. Indeed, the bill has no intention of preventing the next major deregulatory disaster. Instead, as I will illustrate later in my testimony, the SCRUB Act could potentially impede agencies from pursuing critical new regulations to address safety or security gaps caused by a lack of regulation. This is simply because the SCRUB Act is only interested in promoting deregulation.

A very brief overview of how the SCRUB Act is designed to function is helpful. The bill establishes a "Retrospective Regulatory Review Commission" (RRRC) under Title I that is composed of nine appointed members who will compile, on a semi-annual basis, a list of regulations across all agencies that the RRRC recommends repealing according to criteria articulated in the bill and including recommendations from the President, Members of Congress, government officials and the public. This list is submitted to Congress who then votes to approve the list through a joint resolution of approval. Once approved, agencies have 60 days to repeal the rules that the RRRC has identified. Agencies can also act to adopt the RRRC's recommendation of rule repeals voluntarily. Under either scenario, agencies must repeal rules identified by the RRRC and, under Title II, apply such cost "savings" to offset the costs of any new rules agencies are contemplating adopting. In short, agencies are prohibited from adopting new rules that carry costs, irrespective of the benefits of those rules, unless they are able to repeal rules identified by the RRRC that imposed the same measure of costs.

To begin, the bill presumes that there exists a voluminous set of rules that are obviously outdated and in bad need of being repealed, thus justifying the RRRC's existence. This presumption is far from clear. A recent academic survey by a noted administrative law scholar found that more than 80 percent of the business owners who claimed that regulations are a cause of concern for their business could not cite any specific regulations that were burdening them.[19] Public Citizen also undertook research to study the results when the business community, and specifically the Chamber of Commerce, was asked to identify outdated regulations that needed to be repealed. Again, despite broad and ongoing claims about regulatory burdens, the Chamber of Commerce, and other businesses were only able to provide a very modest number of examples regarding regulations that were outdated and should be repealed.[20] Clearly, perception is driving the need for this legislation, not empirical reality.

[19] Deborah Borie-Holtz & Stuart Shapiro, Trying to Float in a Sea of Regulation: Perception and Realty about Regulation Overload, Sept. 15, 2014, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2496436.
[20] Taylor Lincoln, Streamlining the Rules-Making Process, THE HILL (Sept. 16, 2014), http://thehill.com/blogs/congress-blog/the-administration/217751-streamline-the-rules-making-process.

Compounding this problem is the ongoing work pursuant to Executive Order 13563[21] to require agencies to identify outdated regulations they intend to repeal. President Obama announced this retrospective regulatory review initiative in 2011 and the result has been the removal of dozens of regulations with costs savings of up to 10 billion, although the initiative suffers from the same one-sided deregulatory focus and impact as the RRRC in the SCRUB Act. There is little need to duplicate the ongoing work being done by federal agencies at the Administration's behest and the redundancy of the RRRC is no small matter given the taxpayer funds it will expend. Yet, there is a more fundamental question as to what function the RRRC will actually serve if so many of the outdated rules available to repeal have already been identified and repealed by federal agencies under the Administration's retrospective review initiative. It is incumbent upon supporters of the SCRUB Act to demonstrate with concrete and specific examples the types of rules that warrant the existence of the RRRC, and by extension the SCRUB Act, and which have not already been identified and repealed. To date, those cases are few and far between.

It is also troubling that the SCRUB Act directs the RRRC to prioritize repeal of major rules that have been in effect for 15 years or more. Major rules comprise the category of rules that provide the greatest benefits to consumers and working families. Many major rules which have been in place for over 15 years have resulted in some of the greatest public policy success stories both from a public health and economic standpoint. Several of these are detailed in a 2011 report by Public Citizen entitled "Regulation: The Unsung Hero in American Innovation."[22] The removal of ozone destroying chlorofluorocarbons (CFCs), or the banning of carcinogenic vinyl chloride that endangered workers in workplaces, or the reduction of sulfur dioxide emissions from power plants that caused acid rain, or the enactment of energy efficiency standards for consumer appliances are all examples of major rules that have greatly benefited society but that could potentially be targets of the RRRC under the SCRUB act.

Title II of the SCRUB Act, the "cut-go" section, is one of the most dangerous and harmful elements of the bill. The effect of this section would be to require agencies to eliminate rules, with limited exceptions, as a prerequisite to promulgating new ones. The section contains no exemptions for instances in which, for national security or urgent public health and safety matters, agencies need to issue emergency rules. In short, title II of the SCRUB Act would tie our government's hands in responding to a disaster that imperils the public's health, safety, and security.

Even beyond the realm of emergency situations, title II would potentially prevent agencies from putting forth critical new regulations if older regulations of a similar magnitude that were identified by the RRRC and approved by Congress were not concurrently removed. So for example, would the EPA have to remove older regulations such as limiting the amount of lead in

[21] Exec. Order 13,563, 3 C.F.R. 13,563 (2011), *available at* http://www.gpo.gov/fdsys/pkg/FR-2011-01-21/pdf/2011-1385.pdf.

[22] PUBLIC CITIZEN, REGULATION: THE UNSUNG HERO IN AMERICAN INNOVATION (Sept. 2011), *available at* http://www.citizen.org/documents/regulation-innovation.pdf.

gasoline in order to find the cost "savings" to combat climate change and air pollution? Would the Department of Transportation have to remove the regulations requiring seatbelts in cars before requiring new auto safety features? Would the Food and Drug Administration have to remove old food safety measures in order to enact the new pending rules under the bi-partisan Food Safety Modernization Act? If the RRRC says so and Congress approves it, then the answer is yes.

Finally, the SCRUB Act creates a process which entrenches a clear double standard that prioritizes the repeal of rules over the need to develop and finalize new rules that protect the health and financial security of our public. To elaborate, the SCRUB Act requires agencies to repeal rules identified by the RRRC and approved by Congress within 60 days and/or before the agency promulgates a new rule with identical costs. The bill does not allow agencies to give notice to the public and accept comments from the public on the repeal of the rule or do any regulatory analysis of the impacts of the repeal, such as a cost-benefit analysis of the repeal's impact, before finalizing the repeal. For those rules which must be repealed within 60 days, this would be impracticable in any case given the short time frame. On the other hand, once an agency has foregone public comment and all regulatory analysis including cost-benefit analysis in repealing a rule, it then must go through all of these same steps in producing a new rule.[23] There is simply no justifiable procedural principle to exempt the repeal of rules from public participation and regulatory impact analysis. Yet, that is exactly what the SCRUB Act does.

IV. The Responsibly and Professionally Invigorating Development Act of 2015

Turning to the Responsibly and Professionally Invigorating Development Act of 2015 (RAPID), H.R. 382, the bill makes dramatic changes to the process by which agencies examine the environmental impacts, in other words the costs and benefits to the environment, of approving permits to site energy projects. Broadly speaking, agencies are required, under certain circumstances, to conduct environmental impact statements (EIS) under the National Environmental Policy Act (NEPA) before approving permits that allow project development. H.R. 382 imposes a "one-size-fits-all" approach to reforming the NEPA process, and more broadly the permit approval process, which will leave our agencies and the public less informed about the potential harmful environmental impacts of allowing energy project development to proceed while leaving unaddressed other factors that will continue to pose obstacles to approval of project development permits.

H.R. 382 is founded on the assumption that agency compliance with NEPA analyses is a primary cause for delay in approving permits. This assumption ignores the many other factors external to the NEPA analytical process that also impact the timing of a permit approval. Recent Congressional Research Service (CRS) and Government Accountability Office (GAO) reports[24]

[23] A new rule that an agency has deemed must be promulgated under the notice and comment provisions in 5 U.S.C. § 553.

[24] "The Role of the Environmental Review Process in Federally Funded Highway Projects: Background and Issues

have indicated that local/state and project-specific factors have played a critical role in influencing permit approval timing, including local/state agency priorities, project funding levels, local opposition to a project, project complexity, or late changes in project scope. Making reforms to the NEPA analytical process though H.R. 382 will do little to ensure that permit approvals occur on an expedited timeline without also addressing the other CRS and GAO identified factors.

H.R. 382 also introduces a basic and extremely troubling conflict of interest in seeking to reform the NEPA analytical process. The bill would allow "project sponsors," in other words those parties seeking to obtain permit approval, the ability to conduct the NEPA analysis themselves. This would place project developers in the driver seat of determining the potential environmental costs of approving a permit for their project. It is easy to see that project developers will have a vested interest in downplaying those costs in order to gain permit approval. This is akin to asking big banks to determine the costs and benefits of new Wall Street reform rules, or big energy companies to determine the costs and benefits of new climate change or air pollution measures. Such an approach is sure to work against the public interest and in favor of project developers who are able to manipulate the NEPA process to achieve their own desired outcome.

Regarding the reforms to the permit approval process proposed by H.R. 382, the process that the bill puts in place is highly prescriptive, rigid in imposing deadlines and default approvals if those deadlines are missed, limits the number of reasonable alternatives that may be robustly analyzed by agencies in order to allow minimal environmental impact while achieving the permit approval outcome, and curtails the potential for aggrieved parties, including local communities, to seek redress in courts. Other academics and experts who have testified before this committee in the past on very similar versions of H.R. 382 have already detailed in compelling fashion the dangers these procedural reforms pose, and, for the sake of brevity, I refer you to those remarks here.[25] But I would be remiss if I didn't take this opportunity to make crystal clear the double standard that this bill establishes when considered in conjunction with not only the other two pieces of legislation addressed in this testimony, but also the broader universe of "regulatory reform" proposals that have been previously proposed, three of which have already passed the House of Representatives in this Congress.[26]

To illustrate this point, it is useful to compare the procedural reforms to the permit approval process in H.R. 382 to the procedural reforms to the Administrative Procedures Act (APA) rulemaking process in H.R. 185, "the Regulatory Accountability Act" (RAA). It is helpful to keep in mind two points. First, the process established by the APA applies to a large swath of

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for Congress", CRS 7-5700, R42479, April 11, 2012.

[25] *See, e.g.*, Responsibly and Professionally Invigorating Development (RAPID) Act of 2013: Hearing Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary, 113th Cong. 71-95 (July 11, 2013) (Statement of Scott Slesinger, Legislative Director, Natural Resources Defense Council), http://www.gpo.gov/fdsys/pkg/CHRG-113hhrg81852/pdf/CHRG-113hhrg81852.pdf.

[26] H.R. 50, H.R. 185, and H.R. 527.

new regulations that agencies issue, including a large swath of new regulations that are intended to protect the public such as new public health and safety standards, environmental standards, Wall Street reforms, workplace safety standards, and consumer product safety standards, protections for seniors and veterans to name just a handful. Second, the APA process does not apply to permit approvals under H.R. 382.

One organization in particular, the Chamber of Commerce (Chamber), has identified H.R. 382, the RAPID Act, and H.R. 185, the RAA, as two of their three top priorities in reforming the regulatory system.[27] In a letter sent to House members earlier this year in support of H.R. 185, the RAA, the Chamber states plainly "the bill would improve the rulemaking process."[28] If the Chamber believes this is the case, then why not advocate this procedural approach for approving permits as well? For example, according to the Chamber the RAA "would enhance the regulatory process by requiring that agencies must choose the lost costly option…"[29] when adopting new regulations. If that is the case, then why not also require project developers to commit to developing their projects in a way that is as least costly to the environment as possible? Why not force agencies to approve permits only if project developers can demonstrate that they will develop their project in the most environmentally sound way? This is far from the approach established by the RAPID Act. The Chamber goes on to state that the principles underlying the RAA "would make the regulatory process more transparent, agencies more accountable, and regulations more cost-effective."[30] If that is the case, then why has the Chamber decided to support a very different process under the RAPID Act for the approval of permits?

The Chamber can of course speak for itself, but my suspicion is that the Chamber will continue to support one process for government actions, such as approval of permits for energy projects, that the Chamber and the regulated industries it represents supports, and a very different and distinct process for government actions the Chamber and its members oppose, such as new public health and safety standards, environmental standards, Wall Street reforms, workplace safety standards, and consumer product safety standards. As Public Citizen has repeatedly pointed out in the past, legislation such as the three bills discussed in this testimony, along with other various "regulatory reform" measures such as the RAA, are not intended to improve or streamline the regulatory process. Instead, they are designed to render the regulatory process even more dysfunctional, inefficient, and redundant than it currently is. Indeed, the three bills being considered in this testimony, when scrutinized together, demonstrate that supporters of this legislation seek to manipulate the regulatory process so it is as efficient and effective as possible when working in the interests of regulated industries and as inefficient and ineffective as possible when working to protect the public.

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[27] H.R. 712, "Sunshine for Regulatory Decrees and Settlements Act of 2015," is the third.
[28] https://www.uschamber.com/letter/key-vote-letter-house-supporting-hr-185-regulatory-accountability-act
[29] https://www.uschamber.com/sites/default/files/150112_multi-industry_hr185_regulatoryaccountabilityact_house.pdf
[30] *Id.*

To put it simply, it is an attempt to make our government work for corporate special interests and regulated industries and against consumers and working families.

Mr. MARINO. One of my colleagues, Mr. Collins, must get to another hearing.

Mr. COLLINS. The Rules Committee.

Mr. MARINO. So I am going to recognize Mr. Collins for 5 minutes of questions.

Mr. COLLINS. Thank you, Mr. Chairman.

I apologize, I have got rules starting at 5 and I'm trying to do both.

This is very important to me, and I appreciate you holding this hearing today and going forward.

Before we start, I ask unanimous consent to enter into the record a written statement from the Attorney General of the State of Georgia, Sam Olens. Mr. Olens is unable to be here today, but he continues to be a leader on the sue and settle issues and I appreciate his support.

Mr. MARINO. Without objection.

[The information referred to follows:]

Prepared Statement of Sam S. Olens,
Attorney General of the State of Georgia

House Resolution 712, the "Sunshine for Regulatory Decrees and Settlements Act"

The views expressed in this testimony are those of the author alone and do not necessarily represent those of the State of Georgia.

Chairman Tom Marino, Vice-Chairman Farenthold, Ranking Member Johnson, and Members of the Subcommittee, thank you for inviting me to testify today.

As Attorney General for the State of Georgia, I am troubled by the President's disregard for the core constitutional principles of federalism and separation of powers. With increasing frequency, the President, acting through the various agencies of the executive branch, has overstepped his constitutional authority by adopting administrative rules that are untethered from, or even contrary to, the Acts of Congress. The President, in other words, frequently attempts to accomplish through administrative rulemaking what he cannot accomplish through the legislative process. The practice known as "Sue and Settle" is one of the most egregious examples of the President's disregard for the constitutional limits on his authority.

Sue and Settle is a means of legislating via litigation. The scheme is as effective as it is problematic. A special interest group—often after failing in an effort to lobby Congress—first notifies a federal agency that it intends to sue. The special interest group and the relevant federal agency then conduct months of closed-door negotiations. During these negotiations, the special interest group and the agency "settle" on terms that are, unsurprisingly, consistent with both the special interest group's and the President's political agenda. The settlement is then reduced to writing and filed in a federal district court. After the district court signs and enters the settlement, it is of course binding – binding in much the same way that legislation is binding after being passed by the Congress and signed into law by the President.

In this process, States and other affected parties are sidelined from weighing in on policy decisions that directly impact them. In fact, affected parties often have no knowledge of the negotiations until they have become legally binding. That is because congressional directives on transparency and administrative process play no role in Sue and Settle. That is plainly outside the bounds of the law set out in the Administrative Procedure Act, 5 U.S.C. § 500 *et seq.*, and the Clean Air Act, 42 U.S.C. § 7401 *et seq.*, and interrupts important federal principles of separation of powers, federalism, and the rule of law.

As James Madison explained in Federalist No. 47,

> No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty, than that on which the objection is founded. The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.

Sue and Settle runs afoul of transparency and circumvents the steps put in place by Congress for the rulemaking process, and in many instances cedes the legislative, executive, and judicial powers to an outside interest group. I have highlighted below several serious concerns that I have from a legal and constitutional perspective.

Separation of Powers. Congress has set out in the Administrative Procedure Act, the Clean Air Act, and elsewhere clear steps that federal agencies must follow during the rulemaking process. Sue and Settle violates the terms of these procedures even as described in the most general terms. In the Clean Air Act, for example, Congress directs the EPA to begin by publishing a notice of the proposed rulemaking in the Federal Register. 42 U.S.C. § 307(d). That notice must contain a statement of the rule's "basis and purpose," including a summary of the factual data on which the proposed rule is based, the methodology used in obtaining and analyzing the data, and any significant legal interpretations or policy issues behind the proposed rule. Congress also requires in that statute the opportunity for public comment and hearing. None of these congressional directives is obeyed in the context of Sue and Settle. Instead, outside advocacy groups notify agencies of their intent to sue and then conduct months of closed-door negotiations. In certain cases, the resultant consent decree is filed the same day as the complaint. *See, e.g., Defenders of Wildlife v. Jackson*, No. 10-01915 (D.D.C.) (complaint and consent decree filed Nov. 8, 2010); *Environmental Geo-Technologies, LLC v. EPA*, No. 10-12641 (E.D. Mich.) (complaint and settlement agreement filed July 2, 2010). Such processes perform an end-run around the rulemaking processes directed by Congress, and in doing so may also use a back door to achieve policy outcomes that have failed legislatively.

Moreover, although Sue and Settle agreements are rendered legally binding when courts enter them, they have not been subjected to the same adversarial testing as normally occurs in an agency challenge; the court is largely stripped of its decisional role because the parties to the case agree, while other affected parties are absent and impotent. One federal appeals court

agreed, holding that it was an abuse of discretion for a federal court to enter "a consent decree that permanently and substantially amends an agency rule that would have otherwise been subject to statutory rulemaking procedures." *Conservation Northwest v. Sherman*, No. 11-35729, 2013 U.S. App. LEXIS 8396 at *14-*15 (9th Cir. Apr. 25, 2013). In many instances those parties do not even know of the negotiations that lead to a settlement. In others, they are actually denied the opportunity to intervene. *See Defenders of Wildlife v. Jackson*, No. 10-1915, 2012 U.S. Dist. LEXIS 35750 (D.D.C. March 18, 2012). The D.C. Circuit upheld that decision, finding that the petitioners could not demonstrate injury and therefore did not have standing to intervene. *Defenders of Wildlife v. Perciasepe*, No. 12-5122, 2013 U.S. App. LEXIS 8123 (D.C. Cir. April 23, 2013).

In short, Sue and Settle permits an agency – along with an interested advocacy group – to develop its own rulemaking processes, often in contravention of those set out by Congress, and can bar other affected parties from any role in either the negotiation or the ultimate court approval of the settlement. Such unification of authority is contrary to the separation of powers principles so fundamental to our constitutional structure.

Federalism. Sue and Settle also introduces significant federalism concerns. States are often heavily affected by, yet almost never privy to, Sue and Settle negotiations. Yet the structure of our government and laws provides for shared responsibility in a range of regulatory areas. Sue and Settle practices permit the federal government and interested advocacy groups to withdraw constitutional and legal authority from States in order to achieve a desired policy outcome. Regardless of my State's or my personal agreement or disagreement with a particular policy judgment, I have great concerns about expunging States from federal regulatory processes in which we have historically and statutorily played an important and authoritative role.

The Clean Air Act, for example, is predicated on a model of "cooperative federalism," in which States and the federal government divide regulatory responsibilities. The federal government develops standards within the law for emissions limits and other regulatory goals, while States are responsible for implementing those standards through State Implementation Plans, or SIPs. Sue and Settle presents extraordinary complications for this outline of cooperative federalism, including but not limited to the fact that States are forced to develop SIPs

based on settlement timelines rather than at a pace that allows them to review and analyze the appropriate information to make the right decision for how to meet environmental goals within their borders.

Not surprisingly, States have been subjected to the same limitations on intervention as private parties. In *WildEarth Guardians v. Jackson*, for example, EPA opposed intervention by North Dakota even though the case involved how and when EPA should act on North Dakota's proposed Regional Haze SIP. *See WildEarth Guardians v. Jackson*, No. 4:09-cv-02453 (N.D. Cal.) (filed June 2, 2009; consent decree entered Feb. 23, 2010). North Dakota charged that EPA had exceeded its authority in promulgating a regional haze FIP under the auspices of an interstate transport consent decree. The district court did not permit North Dakota to intervene, deeming North Dakota's allegations that EPA relied on the consent decree in promulgating its regulation were a "sham" or "frivolity" – despite the fact that the EPA itself said that it was simultaneously exercising its authority on regional haze and interstate transport requirements. *WildEarth Guardians v. Jackson*, No. 4:09-cv-02453 (N.D. Cal. Dec. 27, 2011).

The Regional Haze issue is thus another arena in which States are losing their traditional role in the cooperative federalism structure of the Clean Air Act due to Sue and Settle consent decrees. EPA's regional haze program seeks to address impairments to visibility at national parks and other federal lands, but is an aesthetic requirement rather than a health-related mandate. The statute, 42 U.S.C. § 7491(b)(2), requires affected States to put forth SIPs that will "make reasonable progress toward meeting the national goal" on regional haze. But for the first time, and as a result of Sue and Settle consent decrees, the EPA is allowed to propose combined Regional Haze SIPs and FIPs (Federal Implementation Plans) – something EPA has not previously done in administering the Clean Air Act. These new FIPs have proved costly and improper. In five separate consent decrees negotiated without State participation, EPA agreed to commit itself to deadlines for evaluating the States' plans, and subsequently determined that each of those plans was procedurally deficient in some respect. *Nat'l Parks Cons. Ass'n v. Jackson*, No. 1:11-cv-01548 (D.D.C. Aug 18, 2011); *Sierra Club v. Jackson*, No. 1-10-cv-02112 (D.D.C. Aug. 18, 2011); *WildEarth Guardians v. Jackson*, No. 1:11-cv-00743 (D. Col. June 16, 2011); *WildEarth Guardians v. Jackson*, No. 4:09-cv-02453 (N.D. Cal. Feb. 23, 2010); *WildEarth Guardians v. Jackson*, No. 1:10-cv-01218 (D. Col. Oct. 28, 2010). Because the consent decree

deadlines did not allow time for states to resubmit plans, the EPA imposed its own FIP controls. This type of action is in derogation of congressional intent, and deprives States of the appropriate level of control as stewards of their resources and environments.

The Regional Haze issue is only one example of EPA's decision to let outside interest groups control its regulatory agenda to the exclusion of its previous federalist partners. States and their Attorneys General are increasingly concerned that we are losing our roles as federal partners in the regulatory arena, and are losing our opportunity to develop environmental plans that respect the individual circumstances of our States while also making important progress on environmental goals.

* * *

My testimony offers only a sampling of the legal and constitutional pitfalls presented by Sue and Settle practices. It is critical that the administrative process be transparent and that states and all affected parties have equal access to the administrative process. I encourage Congress to take the necessary steps to rein in these dangerous practices by approving House Resolution 712, which restores the intended structure and process of federal rulemaking and respects the principles of federalism and separation of powers. Thank you again for the opportunity to submit testimony on this pressing constitutional matter.

Mr. COLLINS. I introduced the Sunshine for Regulatory Decrees and Settlements Act because too often, especially under this Administration, we have seen pro-regulatory plaintiffs sue sympathetic agencies to enact regulations in the dark, absent public input and often at the expense of affected parties. It is unacceptable for taxpayers hard-earned dollars to fund backroom deals to support the rulemaking process.

These type of settlements have tangible affects and they affect the industries across the country, including the thriving agricultural community in the Ninth District of Georgia. The hardworking men and women in Georgia and across the country are trying to make an honest living and have a problem with special interests threatening their livelihood. Moreover, under sue and settle they are not even allowed to participate in the negotiations that will ultimately and directly impact them.

In short, sue and settle agreements create regulation through litigation. The potential for abuse and the lack of transparency in the system is why I believe so strongly in the need for this legislation. My builder will restore transparency and increase public participation and input. H.R. 712 addresses weaknesses in the current system while preserving consent decrees as an important mechanism for settling legal disputes. The ability to have citizens to hold government accountable is an important part of administrative law, but it must be appropriately carried out with transparency and full public participation.

Before I get started, and I know your coworker or someone you had holding a sign today, Mr. Narang, came—I couldn't think of a better witness for us. If he can stand there, and I know his arms would give out after a while, and he could hold that up there and explain.

The general public could just watch and say, is this place broken? And all I have to do is take to your poster and say, yes, it's broken. Can you imagine what small big, big business and anywhere in the country looks at the rulemaking process that affects their lives when they look at that poster. If you're having to sit here and think that we need not be involved in this and get the Federal Government streamlined out of this, I'm not sure what we're doing here.

But I hold a real question you, because you brought up baseball, I like baseball. Let me ask you something, in your baseball analogy you talked about fairness. And in sue and settle what we're dealing with here is we are not stopping access to courts, we're not stopping the process of somebody being able to sue because they missed a deadline. What we are saying here though is you have got to be transparent about it. You've got to open it up and before the ruling comes down you have to hear from affected parties.

So using your baseball analogy, can you tell me if it would be fair that if the—in a process that we put that the one team could always have a runner starting their batting series at third base, is that fair? Where they—and the other team cannot know who it's going to be and then also that if they can't get it in three outs, we'll actually maybe give them one more, do you think having that participation would be fair?

Mr. NARANG. Thank you for the question.

So one runner's starting at third base is essentially what Congress dictates. All the settlement is trying to do is enforce the law that has already been decided by——

Mr. COLLINS. Well, I'm going to reclaim my time here for a second. Because what this actually does is is that if you and I have a disagreement—I'll be the EPA and you your organization—you find the time, you want to sue me, you say because we didn't get this time because I want to see agreement get set and there is plenty in the record that talks about these sue and settle agreements.

But unfortunately, it affects Mr. Ratcliffe. Under the current way it is set up, is we could go into our agreement, I agree with you and I say, okay, let's get a dissent decree and then put it out there, but he never gets an input. Is that fair? Is that really fair?

Mr. NARANG. So the situation that you're referring to here is entirely based on the fact that Congress has mandated legal requirements. The fairness or lack of fairness probably accrues to the fact that these legal requirements exist in the first place.

And when an agency because of the enormous process that I pointed out earlier misses a deadline, that shouldn't be very surprising to anybody looking at the process and an agency like the EPA missing a deadline ascribed by in law by Congress. It's a very simple case. There is not very many issues of fairness when essentially in court all you have to prove is an agency was supposed to issue, you know, a regulation by say March 2nd and they don't issue it by March 2.

Mr. COLLINS. And I understand. My time is going to end and I hate to stop you here, because I would continue this because you make our case for us and I know didn't come here to do that, because you said the whole process is so messed up this is why it's not fair and Congress did it. It is now time for Congress not to do it.

I'm sorry I'm not going to get to the Chamber because the GAO report has a lot of problems. And also I see my friend in the back Jason Smith from Missouri, his drawback is not about outdated regulations, it is about cleaning up the process, and I appreciate him.

And with that, Mr. Chairman, I yield back.

Mr. MARINO. Thank you.

The Chair now recognizes the gentleman from Georgia, the Ranking Member of the Subcommittee, Congressman Johnson.

Mr. JOHNSON. Thank you, Mr. Chairman.

I'd ask unanimous consent to insert the following materials into the record: a December 2014 report commissioned by the American Conference of the United States on Retrospective Review discussing the shortcomings of the square back, also testimony of Dinah Bear, the former general counsel of the Council on Environmental Quality in opposition to the RAPID Act.

The testimony of John Walke, clean air director for Natural Resources Defense Council, in opposition to the Sunshine for Regulatory Decrees and Settlements Act. Also letters from the Coalition for Sensible Safeguards, an alliance of more than 70 public interest consumer advocacy civil rights and justice groups in opposition to

H.R. 712 and H.R. 1155, also a 2012 Congressional Research Service report on the NEPA approval process.**

Also, a 2014 GAO report entitled "Impact of Deadline Suits on EPA's Rulemaking is Limited."*** And last but not least, two reports by the Center for Progressive Reform on regulatory cut-go and the benefits of regulation.****

Mr. MARINO. Without objection.

[The information referred to follows:]

**Note: The submitted document from the Congressional Research Service (CRS) is not included in this printed record but is on file with the Subcommittee and can be accessed at: *http://www.crs.gov/pdfloader/R42479.*

***Note: The submitted document from the United States Government Accountability Office (GAO) is not included in this printed record but is on file with the Subcommittee and can be accessed at: *http://www.gao.gov/assets/670/667533.pdf.*

****Note: The submitted documents from the Center for Progressive Reform (CPR) are not included in this printed record but are on file with the Subcommittee and can be accessed at:

http://progressivereform.org/articles/Regulatory_Pay-Go_1214.pdf

http://www.progressivereform.org/articles/RegBenefits_1109.pdf

Learning from Experience: An Assessment of the Retrospective Reviews of Agency Rules and the Evidence for Improving the Design and Implementation of Regulatory Policy

Joseph E. Aldy

Harvard Kennedy School

Resources for the Future

National Bureau of Economic Research

November 17, 2014

Proposals for Reform of Retrospective Review

While the vast majority of retrospective review efforts dating to the Carter Administration have originated and operated within the executive branch, proposals in recent years would call for legislative action and provide Congress with opportunities to require the elimination of specific, existing regulations. This section briefly describes and evaluates several of these proposals before turning to an examination of the Obama Administration's retrospective review efforts in the followings section.

Regulatory PAYGO

As noted above, President Reagan's Executive Order 12291 called for the collection of data necessary to develop a regulatory budget, but this was not meaningfully implemented before President Clinton rescinded this executive order in 1993. The basic concept is similar to pay-as-you-go budget procedures on the fiscal side of government activities. Regulatory pay-as-you-go would establish a "cost" budget for any given agency's regulatory program, typically based on an estimate of the costs of its current suite of regulations. In the process of proposing a new regulation, the regulator would have to identify an existing regulation with same or greater costs imposed on regulated entities for elimination. Thus, the development of new regulations imposes a discipline of reviewing and striking existing regulations to ensure that the net cost burden of that agency's regulatory program does not change.

Senator Warner (2010) has expressed support for such an approach. Likewise, recent legislative proposals have included some version of regulatory PAYGO. The "Searching for and Cutting Regulations that are Unnecessarily Burdensome Act of 2014" (H.R. 4874, 113th Congress; the "SCRUB Act") includes a so-called "CUT-GO" provision. In this bill, an appointed commission would identify existing Federal

regulations for elimination, with the objective of reducing the aggregate costs of Federal regulation by at least 15%. This commission would report this recommended list of rules for elimination to Congress, and each chamber of Congress would have the opportunity to approve of the recommendations through a joint resolution process. If these recommendations are approved through a joint resolution, then agencies shall initiate the regulatory process for striking the listed rules. Absent a joint resolution, the recommended list of rules still imposes a meaningful constraint on regulators. If an agency decides to promulgate a new rule, it must offset the cost of the new rule by striking rules with equal or greater costs from the recommended list.

Regulatory PAYGO suffers a daunting technical challenge. As noted above in Harrington (2006) and Office of Management and Budget (2005), one of the challenges with understanding the economic impact of the current Federal regulatory program is the dearth of ex post estimates of benefits and costs. Generating an aggregate estimate of the costs of a given agency's suite of regulations – especially given the variations in the timing of costs (some rules impose large capital investments, which are one-shot investments, while others impose periodic operational costs), potential interactive impacts of multiple regulations (which could either increase or decrease aggregate costs relative to assessment of the individual regulations), and even potential interactive impacts of regulations with other agencies – is very difficult. Moreover, whatever estimate an independent commission would produce would be subject to quite significant uncertainty, which could be problematic given the precision within which the estimates would be used in determining whether a new regulation could go forward.

More important, regulatory PAYGO is inconsistent with fundamental principles of regulatory policy. The government is in the business of regulation to attempt to correct failures in the operation of markets. A government intervention mitigates the market failure, at least to some extent, if its benefits exceed its costs, and the intervention should aim to deliver what the markets would produce if they were not characterized by the market failure. In other words, regulatory interventions should maximize

net social benefits. Regulatory PAYGO completely ignores the benefits side of the ledger. Implementing regulatory PAYGO could make society worse off. Consider an example of two regulations, one existing and one proposed. Suppose that each regulation has social benefits that exceed social costs. Under the status quo approach to regulation, the government should implement both the existing and the proposed regulation. Under regulatory PAYGO, the government would have to eliminate the existing regulation, with positive net social benefits, if it aims to implement the proposed regulation. This is contrary to the weak and strong efficiency standards that have guided regulatory review since 1981.[13]

Regulatory Review Commissions

The idea of an independent commission to evaluate regulations, if guided by a net social benefits standard instead of the strict cost standard of regulatory PAYGO, has some potential merit. In addition to the commission envisioned in the SCRUB ACT, the "Regulatory Improvement Act of 2014" (H.R. 4646, 113th Congress) would establish a commission that would make recommendations for striking regulations based on their economic costs. These recommendations would be considered in their entirety by Congress and if approved by each chamber and signed into law by the President, they would trigger agency regulatory processes for eliminating the listed rules. The process would effectively mirror the base realignment and closure process for military facilities after the end of the Cold War.

A fresh set of eyes to evaluate regulations, especially by those who do not have a vested interest in the outcome like regulators may have during their assessment of their own regulatory programs, could bring substantial value to retrospective review. Nonetheless, attempting to evaluate the entirety of agencies' regulatory programs is a task that would clearly require more time than allocated to the commissions envisioned in the "Searching for and Cutting Regulations that are Unnecessarily

[13] Refer to Viscusi (1983) and Shapiro et al. (2012) for further critiques of regulatory PAYGO.

Burdensome Act of 2014" and the "Regulatory Improvement Act of 2014." Indeed, there are real questions whether this would be the most effective way forward under the current retrospective review undertaken by the agencies. If legislation aimed to launch such a commission, it may be better to orient the commission to (a) identifying a few of the most egregious regulations that fail a benefit-cost test and/or provide opportunities for reform that would maintain a significant level of benefits with dramatically lower costs; and (b) identifying procedures for agencies to employ in the planning for and undertaking of retrospective review.

Creation of Independent Regulatory Review Authorities

The "Strengthening Congressional Oversight of Regulatory actions for Efficiency Act" (S. 1462, 113th Congress) would create a regulatory analysis division within the Congressional Budget Office to conduct independent prospective analysis of proposed economically significant regulations and analysis of the costs and benefits of existing economically significant rules that have been in effect for five years. Greenstone (2014) noted that such independent assessments of existing regulations would improve the credibility of regulatory evaluations. Likewise, Lutter (1999) notes a proposal by Heather Ross of Resources for the Future in the late 1990s calling for the creation of a Congressional office to undertake independent replications of regulatory impact analyses. Such an office could conduct ex ante analyses to inform the consideration of proposed regulations, as well as ex post analyses to inform retrospective review.

Greenstone (2009) called for an independent regulatory review board to evaluate existing rules because "history is not kind to organizations that only engage in self-evaluation" (p. 119). This independent regulatory review board would be staffed by "well-respected professionals and academics who have the technical ability to review evaluations critically and do not have a stake in whether a

HOUSE JUDICIARY COMMITTEE
SUBCOMMITTEE ON COURTS, COMMERCIAL AND ADMINISTRATIVE LAW

HEARING ON H.R. 4377 - THE RESPONSIBLY AND PROFESSIONALLY INVIGORATING DEVELOPMENT ACT OF 2012 (The "Rapid Act")

April 25, 2012
Room 2141 Rayburn House Office Building

Introductory Remarks

Thank you for the invitation to appear before the Subcommittee on Courts, Commercial and Administrative Law in regards to H.R. 4377, The Responsibly and Professionally Invigorating Development Act of 2012. I appreciate the opportunity to testify, and hope that my remarks will assist the Subcommittee as it considers the important issues raised by H.R. 4377.

By way of background, the Council on Environmental Quality (CEQ) is the agency established by Congress with responsibility for overseeing the National Environmental Policy Act, the subject of much, although by no means all, of H.R. 4377's focus. I was asked to serve as the Deputy General Counsel for the Council on Environmental Quality (CEQ) with President Reagan's team in 1981. In 1983, I was appointed as General Counsel, a non-career position. In that role, I had responsibility for oversight of agency implementation of NEPA. I remained in that position throughout the remainder of President Reagan's tenure and that of President George H.W. Bush. I resigned from CEQ in October, 1993 and resumed responsibilities as General Counsel in January, 1995. I remained at CEQ during the Clinton and George W. Bush administrations until the end of calendar year 2007, when I retired from federal service. My husband and I moved to Tucson, Arizona last year and I continue to be active in the field of environmental law generally and NEPA specifically.

As this bill is considered, it is important to recall the purpose of the NEPA process. NEPA does not regulate the private sector. Rather, it informs government agency decisionmaking, with the help of public involvement. The NEPA process helps to ensure that agency employees "look before they leap" so that federal dollars are spent wisely through the identification of less controversial, feasible and less costly alternatives. It is also the framework for identifying appropriate mitigation measures that could resolve problems for both the project proponent and the public resources during and after project implementation. It provides an important opportunity – often the only opportunity – for the public to influence federal agency decisionmaking.

While someone who reads H.R. 4377 quickly may assume that the bill is directed only at environmental laws, principally NEPA, the bill's explicit deadlines for decisionmaking as well as for environmental review and compliance processes implicitly amend dozens of unidentified authorizing statutes for every federal agency in the executive branch. It approaches changes to environmental law requirements by relying on what is generally referred to as the NEPA process and through required amendments to CEQ's regulations implementing the procedural provisions

of NEPA (40 C.F.R. Parts 1500-1508). All other agencies and departments would be required to undertake rulemaking to conform to the requirements of the bill, for changes to NEPA procedures, other federal environmental laws, their authorizing legislation, and for some agencies, their administrative appeals processes.

I understand that this legislation represents the frustrations of those who perceive environmental laws and regulations to be the major cause of unwarranted delays in approval of construction projects that require federal approvals or for which federal funding is sought. Environmental review processes are not always conducted perfectly, from anyone's perspective. However, the role of environmental regulation in project delays is often taken out of context and overplayed in comparison to other causes of delay. As a result, proposed solutions often fail to address the real causes of those delays that really are unnecessary and related to environmental issues. A major premise of this bill appears to be the belief that foot-dragging or recalcitrance by government agencies is the principal cause of delay in achieving compliance with environmental laws and reaching decisions. The bill addresses this premise through provisions that in some instances eviscerate the line between the role of government and private sector project proponents, require federal agencies and federal courts to ignore information, and mandate a "one size fits all" solution to the perceived cause of delay. It is not clear from the bill that the relationship between provisions in this statute and the other laws it affects has been thought through. A consistent theme in the bill is that the foreordained outcome of environmental review and compliance processes should be the rapid approval of all proposed projects, a premise that is inconsistent with law in some cases and good public policy as an across-the-board proposition.

Causes of Delay

While the causes of project delay have not been systematically documented throughout the government for all actions, the body of information available has improved greatly since GAO noted in 1994 that there was no repository of information on highway projects and their environmental reviews.[1] In particular, some valuable analysis has been done on this issue in the context of highway construction. Since at least the mid-1990's, two Congressional agencies, the General Accounting Office/General Accountability Office (GAO), and the Congressional Research Service (CRS), have prepared a series of reports, remarkably consistent in their findings, regarding the construction of highway projects and the relationship of environmental laws generally and NEPA specifically to decisionmaking timelines. Some of this research is relevant to construction in other federal contexts, but certainly, this type of research is needed more broadly if agencies and/or legislators are going to be able to formulate successful approaches to reducing delays.

By 2002, improvement in baseline data and more specific identification of factors affecting completion time was available, concurrent with the implementation by both federal and state highway agencies of initiatives to improve the efficiency of environmental review processes. Significantly, these initiatives included the use of interagency funding agreements to

[1] "Highway Planning: Agencies are Attempting to Expedite Environmental Reviews, but Barriers Remain", GAO/RCED-94-211, p. 7.

hire additional staff at state and federal environmental agencies.[2] This was a very important move, confirmed by a 2003 GAO report that found that 69% of transportation stakeholders reported that state departments of transportation and federal environmental agencies lacked sufficient staff to handle their workloads.[3] While a similar analysis has not been done for other departments and agencies, based on my observations of trends in agency planning and compliance budgets, I believe that similar or much more severe staff shortages exist for many programs.

Recent investigations by CRS underscore both the genesis of delays in factors other than federal NEPA processes and how better resource allocation at a federal agency can expedite decisionmaking. Three weeks ago, CRS issued a report on the environmental review process for federally funded highway projects. In relevant part summary, the report found that:

> "The time it takes to complete the NEPA process is often the focus of debate over project delays attributable to the overall environmental review stage. However, the majority of FHWA-approved projects required limited documentation or analyses under NEPA. Further, when environmental requirements have caused project delays, requirements established under laws other than NEPA have generally been the source. This calls into question the degree to which the NEPA compliance process is a significant source of delay in completing either the environmental review process or overall project delivery. Causes of delay that have been identified are more often tied to local/state and project-specific factors, primarily local/state agency priorities, project funding levels, local opposition to a project, project complexity, or late changes in project scope. Further, approaches that have been found to expedite environmental reviews involve procedures that local and state transportation agencies may implement currently, such as efficient coordination of interagency involvement; early and continued involvement with stakeholders interested in the project; an identifying environmental issues and requirements early in project development."[4]

Importantly, this report points out that while much work has been done to document delays and improvements in timelines related to highway construction, very little work has been done to understand why certain types of delays occur. One government study suggested that a major affect was actually external social and economic factors associated with different geographic regions of the country.[5] As noted above, in my view, staff shortages clearly have been a major factor and the highway department funding of staff has, I understand, improved the situation in that area. But little analytical work has been done regarding federally assisted or funded construction that takes place in other contexts.

Project Sponsor Responsibilities

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[2] "Highway Infrastructure: Preliminary Information on the Timely Completion of Highway Construction Projects", GAO-02-1067T.
[3] "Highway Infrastructure: Stakeholders' Views on Time to Conduct Environmental Reviews of Highway Projects", GAO-03-534, p. 5.
[4] "The Role of the Environmental Review Process in Federally Funded Highway Projects: Background and Issues for Congress", CRS 7-5700, R42479, April 11, 2012.
[5] *Id.* at p. 35.

Now let me turn to the Responsibly and Professionally Invigorating Development Act of 2012. By definition, "project sponsors" for purposes of this bill includes both public and private entities as well as public-private entities.[6] " Projects" are defined as construction activities "undertaken with Federal funds or that require approval by a permit or regulatory decision issued by a Federal agency."[7] The first provision of the bill following the definitions articulates the role of project sponsors in the NEPA process. "Upon the request of any project sponsor", the project sponsor may prepare any NEPA document (including an environmental impact statement) in support of its proposal. § 2(c)(1) The provision goes to state that in such cases, the lead agency must furnish oversight and independently evaluate, approve and adopt the document prior to taking action based upon it.

This blurring of the distinction between government and private sector roles in the context of a process designed to inform government action is extremely troubling. This is particularly true because projects that require an environmental impact statement (EIS) are those that by definition may have genuinely significant impacts. Government agencies, whether at the federal, state, tribal or local level, are structured to represent the public and are accountable to the public through a variety of mechanisms. Corporations have legitimately different responsibilities to their shareholders. Both the public at large and corporate shareholders have the right to expect these respective sectors to behave in ways that are responsible about those distinctions.

Project sponsors, whether governmental or private, already have a central role in the NEPA process. Many, if not most, proposed actions analyzed under NEPA are, of course, initiatives of the lead agency itself. State agencies proposing a project may prepare EISs and other NEPA documents under conditions set out in Section 102(2) (D) of NEPA. State, local and tribal government project proponents may become joint lead agencies with federal agencies when they have similar environmental review requirements, or cooperating agencies when they have jurisdiction by law over some component of the project or special expertise regarding any environmental impact associated with one or more of the alternatives to be analyzed. 40 C.F.R. §§ 1501.5(b), 1506.2, 1500.5(b), 1502.1(b), 1501.5(c), 1501.5(f), 1501.6, 1503.1(a) (1), 1503.1, 1503.3, 1506.3(c), 1506.5(a), 1508.5. Private sector project sponsors may submit whatever information they choose to the lead agency and to prepare environmental assessments (EAs). 40 C.F.R. § 1506.5. Due to inadequate agency budgets, project sponsors also often choose to pay for preparation of an EIS by a consultant or contractor that is chosen by and works under the direction of the lead agency to expedite EIS preparation.

However, the law has always wisely drawn a line between private sector and public project proponent involvement when the proposed action is one that triggers the statutory requirement for a "detailed statement" for proposed actions significantly affecting the quality of the human environment, that is, an EIS. In that situation – a very small percentage of the thousands of actions falling under NEPA annually – the distinction between private sector project proponents and government agencies is drawn more sharply. Private sector project proponents are not permitted to prepare EISs. Any contractor selected by the agency to prepare the EIS must execute a disclosure statement prepared by the lead agency specifying that it has no

[6] Section 2(b) (12).
[7] Section 2(b) (11).

financial or other interest in the outcome of the project. 40 C.F.R. §1506.5(c). Obviously, a private sector project sponsor inherently has a financial interest in the project.

The public is already concerned about the integrity of the process, especially when it knows that the proponent is funding preparation of the EIS. The provisions in this section intended to be safeguards regarding government agency oversight and approval of NEPA documents prepared by proponents are not sufficient to ensure that integrity and, in fact, are weaker than those already required under NEPA for state project proponents.

This extremely serious concern is exacerbated in the next provision of the bill, Section 2(c)(2), that authorizes lead agencies to accept "voluntary contributions of funds from a project sponsor" for purposes of either undertaking the NEPA process or making a decision under another environmental law for the sponsor's proposed project. Under this provision, corporate money could be used to pay for the preparation, oversight and approval of a NEPA document, a Section 7 consultation under the Endangered Species Act, a Clean Water Act permit, etc. These are inherently government functions that benefit the public at large (as well as the proponent) and should be financed with government funds rather than from private sources that raise the specter of a conflict of interest.

Limitation on Number of NEPA Documents

Another major concern with this legislation arises from the restrictions found in Section 2(d) regarding the number of EISs and EAs. The bill would limit an agency to "not more than 1" EIS and EA per proposed project and "no Federal agency responsible for making any approval for that project may rely on a document other than the environment document prepared by the lead agency." This section is a solution in search of a problem, since agencies generally do not seek out opportunities to prepare additional EISs. Indeed, decisions to prepare a revised or supplemental EIS or additional EA are usually painful ones reached after much internal discussion within an agency. However, the fact is that sometimes NEPA documents prove to be seriously inadequate and must be revised or supplemented to remedy those inadequacies. And the fact remains that sometimes there are major new developments, whether of a legal, policy or factual nature, that require additional analysis. An artificial cap to the number of NEPA documents that can be prepared will not change these facts; it will simply put the analyses out of sync with the needs of decisionmakers and the public. And because, under the bill, all federal agencies would have to rely on an EA or EIS for compliance with more than 30 other federal environmental laws, every document needed for compliance would now have to be included in the NEPA document, thus lengthening considerably every one.

It is unclear how this provision would be interpreted in the context of programmatic EISs and tiering. For example, every military installation prepares an installation plan under the Sikes Act. That installation plan, which is the subject of NEPA compliance, may approve future construction of a major building complex or weapons testing area. Several years later, the installation may need to do another EIS focused specifically on that construction. It is not clear whether the installation would be prohibited from doing the second EIS under this provision.

Similarly, this limitation would create confusion and litigation issues in the context of judicial remedies. A typical remedy when a federal court has determined that a finding of no significant impact was inadequately justified is the preparation and issuance of additional NEPA analysis addressing the deficiencies identified by the court. It is not clear whether this provision eliminates the judicial branch's ability to provide agencies with another opportunity to comply with the law by issuing a new EA or EIS. Taken literally, this provision could require that a defective EA be replaced only with a full EIS, or if both an EA and an EIS already addressed a project, could leave a court with no remedy other than to enjoin a federal agency from proceeding with the proposed action at all, because there was no ability to undertake further compliance.

Adoption of State Documents

The bill also provides that "upon the request of a project sponsor" (public or private), a lead agency must adopt a document prepared under a state environmental impact assessment law if the state law and procedures at issue are "substantially equivalent to NEPA".[8] CEQ would be given 180 days to designate which state environmental impact assessment laws meet that criterion, along with undertaking additional rulemaking to conform to the requirements of this bill in the same period.

Coordination between federal agencies and states with environmental impact assessment laws is extremely important. Clearly, the preferred situation for both the proponent and the public is for both federal and state laws to be complied with through a single process. As a result, the CEQ regulations already provide for joint planning processes, joint environmental research and studies, joint public hearings (except where otherwise required by another law), joint environmental assessments and joint environmental impact statements. In these cases, the appropriate state agency may be a joint lead agency. Where state laws or local ordinances have EIS requirements in addition to but not in conflict with those in NEPA, federal agencies are instructed to cooperate in fulfilling those requirements as well so that one document will comply with all applicable laws. 40 C.F.R. 1506.2. This approach under existing law can work very well, and I have seen many examples of joint federal/state environmental review documents. Further, as mentioned earlier, state agencies are permitted under NEPA to take responsibility for the preparation of an EIS under NEPA. Additionally, I believe some states have provisions in their state laws to allow the adoption of NEPA documents to support their own requirements under certain circumstances. These approaches, including a state legislature's decision to allow the adoption of documents prepared under the auspices of NEPA, are, in my view, much more workable and likely to expedite project decisionmaking successfully and without intruding on state prerogatives rather than requiring CEQ, an agency in the Executive Office of the President, to interpret the law, regulations, guidance and case law of states and to make regulatory judgments about them.

I would further note that this section of H.R. 4377 provides for the possibility of a federal agency supplementing a state environmental review document, but only if there are significant new changes or new circumstances. The quality and adequacy of documents vary, whether under federal, state or municipal environmental review procedures, and this construct omits the

[8] Section 2(d) (2).

very provision in the CEQ regulations giving agencies discretion to supplement a NEPA document for other reasons, such as inadequacy of an analyses for a particular issue. Further, the provision reduces the current review and comment period from 45 to 30 days, a recipe, in complex projects, for inadequate public understanding of and participation in public agency decisions.

The provision for adoption of state documents in this section also appears to circumvent the requirements for adoption of federal documents set forth in the CEQ regulations. As I read the legislation, the only requirements associated with adoption of a state document are that the project sponsor request it and that CEQ would have designated the particular state procedures to be "substantially equivalent" to NEPA. Thus, apparently, the federal agency would have no responsibility for independent review and evaluation, other than determining whether there are new circumstances or new information that would trigger the need to supplement the document, and no requirement for recirculation. 40 C.F.R. §1506.3.

Role of Participating Agencies

"Participating agencies" would be, in many instances, the same as cooperating agencies under existing law; indeed, any participating agency that would be required to adopt a document under this bill would inevitably also be a cooperating agency with jurisdiction by law under the NEPA regulations. However, the intent of the "participating agency" category is to include any agency, at least at the federal or state level. Unlike the CEQ regulations, there are no references to county and tribal governments that "may have an interest in the project".

Under Section 2(e) (8) of the bill, each participating agency is limited in its comment to those areas where it can point to statutory authority pertaining to the subject of its comments. The lead agency is directed not to act upon, respond to or include in any documents any comment submitted by an agency that it deems to be outside of the authority and expertise of the commenting agency. This is a remarkable direction to the lead agency to put blinders on instead of using common sense and judgment. In my experience, agencies typically do focus on those subject areas within their authority and expertise and they certainly are accorded more deference by the lead agency and by the judiciary for comments reflecting that expertise. However, currently, lead agencies may read and consider other comments, if there are any such comments, just as they read, review and respond to comments from the project proponent, members of the public, communities, county commissioners and other affected parties who do not have statutory authority or academic credentials in a particular discipline. Ironically, this provision puts federal (and possibly state agencies) in a class distinctly behind an individual who has no expertise, let alone authority, on a particular matter but whose comments in their totality require a response from the lead agency.

Any agency that fails to respond to an invitation to be a participating agency within 30 days would be deemed to have declined the invitation and is thus precluded from submitting comments on or "taking any measures to oppose the project; any document prepared under NEPA for that project; and any permit, license, approval related to that project." The lead

agency is instructed to disregard and not respond to or include in any NEPA document any comment by an agency that has declined an invitation or designation by the lead agency to be a participating agency. It is not clear how the prohibition against an agency "taking any measures to oppose the project" would be interpreted. Federal agencies are already barred from lobbying for or against government action. CEQ's regulations have a more narrowly circumscribed provision, to deal with the circumstance of an agency declining an invitation to become a cooperating agency. They preclude an agency with jurisdiction by law from declining to be a cooperating agency and permit other agencies to decline degrees of involvement in an action when they are unable to assume particular responsibilities of a cooperating agency. 40 C.F.R. § 1501.

The bill also mandates concurrent reviews by all federal agencies, so that each federal agency must carry out their obligations under applicable law in conjunction with NEPA. On its face, this is similar to the existing provision in the CEQ regulation that, "To the fullest extent possible, agencies shall prepare draft EISs concurrently with and integrated with environmental impact analyses and related surveys [omitting examples and citations] and other environmental review laws and executive orders." 40 C.F.R. § 1502.25(a). CEQ has worked very hard over many administrations to try to achieve this goal as have several other federal agencies. However, declining agency budgets make this very difficult to achieve and many agencies defer initiation of processes under other laws until the NEPA process is partially and completely concluded, in order to capitalize on the lead agency's NEPA documentation.

Alternatives Analysis

Section 2(g) of the bill deals with the important issue of alternatives analysis. The analysis of reasonable alternatives to achieve an agency's purpose and need in moving forward with a proposed action is, by definition, the "heart of the environmental impact statement." 40 C.F.R. § 1502.14. Without a robust alternatives analysis, this process would simply document the environmental effects of a decision rather than informing the decision. In my experience, by far the most important achievements of the NEPA process have come through alternatives analysis. The requirement in this section to afford an opportunity for involvement by cooperating agencies in determining the range of alternatives to be considered is positive and consistent with current law and guidance.

However, Section (g) (2) on the range of alternatives is confusing and imprudently restricts alternatives. In part, this section states that there is no requirement to evaluate any alternative identified but not carried forward to detailed evaluation in a NEPA document "or other EIS or EA". That is as factually correct statement so far as it goes under current law, but only to the extent that the lead agency's decision not to carry an alternative forward for detailed evaluation has a rational basis and is not deemed to be arbitrary and capricious. As a result, the bill's provision creates confusion about whether it is intended to change current law in some manner. Secondly, this section states that "cooperating agencies shall only be required to evaluate alternatives that the project sponsor could feasibly undertake, including alternatives that can actually be undertaken by the project sponsor, and are technically and economically feasible." To start with, it is typically the lead agency, not cooperating agencies that evaluate alternatives (as opposed to identifying them). Alternatives must reflect the agency's purpose and

need and it is already the law that it is the lead agency that determines that purpose and need[9]. However, whatever agency evaluates alternatives for a proposed project, those alternatives should not be restricted to the needs of one particular project proponent only, although the applicant's requirements should certainly be part of the analysis. In the words of CEQ's guidance on this point:

> "In determining the scope of alternatives to be considered, the emphasis is on what is 'reasonable' rather than on whether the proponent or applicant likes or is itself capable of carrying out a particular alternative. Alternatives must be reasonable alternatives, including those that are *practical* or feasible from the technical and economic standpoint and using common sense, rather than simply *desirable* from the standpoint of the applicant." *Forty Most Asked Questions, Id.*, Q. 2a.

The proponent's needs must be considered in shaping the alternatives analysis and the proponent's proposal, of course, usually the proposed action. But agencies are not free under current law to exclude all other considerations. The project proponent is involved with a federal agency in the first place because Congress found a sufficient national interest in funding, regulating or permitting a particular category of activities to mandate a federal role in the proposed action. That national interest – the public's interest – needs to be at the table as agencies and the public identify potential alternatives.

Further, linking alternatives analysis to one particular proponent could undercut the private sector competitive process. In a number of situations, an opportunity for development of a particular type of project is apparent to a number of private sector entities. An agency may receive multiple applications for a transmission line, an energy project, or some other sort of project within roughly the same timeframe. In those circumstances, a lead federal agency must consider the needs and requirements of both the public in the context of national policy and all of the applicants.

Coordination and Schedules for Compliance with Environmental Laws

Section 2(h) of the "Responsibly and Professionally Invigorating Development Act" deals with coordination and scheduling. The first part of this section is similar to but somewhat inconsistent with CEQ's regulations on establishing time limits. CEQ's regulations provide that the agency must set time limits if an applicant requests them and may set time limits of a state or local agency or member of the public requests them, provided that the limits are consistent with the purposes of NEPA and other essential considerations of national policy. 40 C.F.R. 1501.8. H.R. 4377 mandates the development of a schedule for all construction projects. Both the CEQ regulations and the bill set forth factors to be considered in determining time limits, but H.R. 4377 omits several factors identified in the CEQ regulation, among them the degree of public need for the proposed action (including the consequences of delay and the degree to which relevant information is known, and if not known, the time required for obtaining it). H.R. 4377 then caps whatever schedule the lead and participating agencies might develop at no longer than

[9] See Correspondence between Secretary of Transportation Norman Mineta and CEQ Chairman James Connaughton at http://www.dot.gov/execorder/13274/impsched/letters/minetamay6.htm for a discussion of the roles of lead and cooperating agencies with regard to developing a highway's purpose and need.

two years for a project requiring an EIS or one year for preparation of an EA. Agencies are allowed some flexibility in extending the deadlines but may not extend the deadline for an EIS by more than one year or for an EA by more than 180 days.

These time periods are within the realm of the reasonable in many cases if, importantly, an agency has adequate reasons to implement NEPA and all other environmental laws that may be implicated in a proposed action. However, there are some proposals subject to NEPA of extraordinary complexity or proposals that are affected by events quite outside of the agency's control. For example, some proposals subject to NEPA are affected by complex negotiations between the United States and foreign nations or by changes in Congressional direction. Some proposals may deal with cutting edge science or new information of great import. Some proposals may be significantly changed in the course of environmental review, because of the analysis or outside events. Agencies should not be forced to cut off analysis and public involvement where events outside of their control or the nature of a complex project warrant it. Otherwise decisionmaking will suffer, and in some cases could result in forced denials when full documentation would have facilitated approval.

Congress must consider the implications of this broadly, not just for one particular type of project. For example, this bill would govern the granting of a license for a nuclear power plant. Imagine, for instance, that the NRC has completed the NEPA process for the construction of a new nuclear power plant, or the relicensing of an existing one, and is about at the end of the allowed statutory time, including the one permitted extension. Then a major accident happens somewhere in the world. The Commission is asked to send a team of experts to the site to help with the immediate situation and another team a bit later to help evaluate the causes of the accident. The Commission may rationally wish to wait for a period of time before going forward with decisions on a plant, especially if early indications are that there are technical similarities in the plant that experienced an accident and the plant that is the subject of the imminent NRC decisionmaking. If it felt obliged to comply with the two year timeline, it would required to make a decision without the information that most Americans would expect and want the NRC to have at its disposal in order to safeguard human health and the human environment from potentially disastrous consequences.

Schedule for Agency Decisionmaking

Section 2(i)(4) restricts all other federal agency decisionmaking related to construction projects. For agencies that are required to "approve, or make a determination or finding regarding a project prior to a record of decision for an EIS or a finding of no significant impact, an agency must make that decision no later than 90 days after the lead agency publishes a notice of availability of a final EIS or issuance of other final environmental documents "or no later than such other date that is otherwise required by law, whichever comes first." The bill goes on to provide that "notwithstanding any other provision of law", an agency must make a final decision on whether to approve a proposed project within 180 days after the execution of a record of decision or finding of no significant impact, unless mutual agreement is reached with "the federal agency, lead agency and the project sponsor" or when extended for good cause by a federal agency for no longer than one year.

The wording in this section is puzzling because if an agency has broad approval authority over a project (as opposed to making a determination or finding) it should already be the lead or joint lead agency and would be issuing a Record of Decision or other decision document[10]. If an agency is a cooperating agency because it has jurisdiction by law to issue a required permit associated with a project that requires an EIS, that cooperating agency will also sign a Record of Decision or, in the case of a project covered by an EA, another decision document.

To the extent that the provision's intent is to cover lead agencies, it impinges on the authority of agencies under countless non-environmental laws and arguably is incompatible with the constitutional authority of the President to manage the executive branch. There are a number of factors affecting decisionmaking that are outside of an agency's control. For example, the past few Presidents, both Republican and Democrat, coming into office have put a hold on entire categories of actions, including some requiring compliance with NEPA, so that they can evaluate the work of their predecessor and give their own direction. Foreign policy and/or national security concerns may affect some proposed decisions. Further, NEPA does not capture the entire universe of considerations regarding a federal agency's decision; indeed, that is precisely why the record of decision is not defined in the CEQ regulations as an environmental document. Considerations having nothing to do with environmental impacts and not analyzed in an EIS or EA or under other environmental laws often lawfully guide the final agency decision. Under this provision, an agency decisionmaker is faced with either disapproving a project or approving it under circumstances that may be arbitrary and capricious.

If a federal agency does not act upon a project within these timeframes, the project "shall be deemed approved by such agency and such agency shall issue any required permit or make any required finding or determination authorizing the project to proceed within 30 days" of the deadlines set forth in this act. That automatic approval is then shielded from judicial review.

To the extent that this section is not meant to refer to federal agencies that are signing a Record of Decision or other decision document but rather refers to other federal agencies that have legal responsibilities for making determinations or findings, the section is still confusing. Most findings or determinations do not "authorize" the project to proceed; in the environmental context, they provide information about the impacts of proceeding that have legal consequences but are not the kind of go/no go decision that a permit or license represents. Possibly the result would be for such agencies to issue a finding or determination reflecting the administrative record to date and then conclude that this section requires them to issue that record.

[10] Note that while a federal agency may choose to combine a decision document with a Finding of No Significant Impact (FONSI), a FONSI by itself is not a decision document on a project, but rather a finding as to the level of environmental impacts anticipated by the agency. Agencies may and usually do issue a separate decision document based on the underlying statutory authority that authorizes whatever permit or license has been requested.

Issue Identification and Dispute Resolution

Section 2(j) deals with issue identification and resolution of disputes, two other important topics within the context of environmental review. Agencies are directed to work cooperatively to identify resolve issues that could delay completion or environmental review. This direction is consistent with the entire thrust of the NEPA process. But the provision goes on to direct agencies to resolve issues that could result in the denial of any approval required for a project. It provides the outlines of a dispute resolution process that would culminate in notification of a dispute to heads of participating agencies, the project sponsor and CEQ "for further proceedings in accordance with Section 204 of NEPA."

A troubling aspect of these provisions is the language used that suggests that the only acceptable outcome of the NEPA process and other environmental laws is approval of a project. In fact, for prudential reasons agencies are required to analyze the "no action" alternative and rarely, but sometimes, choose that alternative. It is appropriate to seek resolution of disputes about the analysis and the process but it is inappropriate to tilt the decisionmaking process across the board in favor of wholesale approval. Not every proposed project is of equal value and worth and sometimes it is the role of government to say no, not least when federal funding or other public resources are squarely implicated.

Judicial Review

Finally, the bill would enact two provisions related to judicial review. The first provision, "notwithstanding any other provision of law" barring a claim arising under Federal law related to a permit, license or approval by a Federal agency unless the plaintiff "submitted a comment during the NEPA process on the issue on which the party seeks judicial review and the comment was sufficiently detailed to put the lead agency on notice of the issue" overstates current law related to NEPA claims and would also apply, as written, to all claims under any federal law, whether related to environmental laws or any other law. In NEPA cases, the Supreme Court has already made it very clear since 1978 that, "While NEPA places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action, it is still incumbent upon intervenors who wish to participate to structure their participation so that it is meaningful, so that it alerts the agency to the intervenors' position and contentions. . . . The comment cannot merely state that a particular mistake was made . . . ; it must show why the mistake was of possible significance in the results. . . . ", *Vermont Yankee Nuclear Power Corp v. NRDC*, 435 U.S. 519 (1978). That holding has been reiterated numerous times federal courts and is well settled NEPA law. Indeed, some agencies, such as the Forest Service, regularly include the following admonition in all of their draft EISs:

> "Reviewers should provide the Forest Service with their comments during the review period of the DEIS. This will enable the Forest Service to analyze and respond to the comments at one time and to use information acquired in the preparation of the final environmental impact statement, thus avoiding undue delay in the decision making process. Reviewers have an obligation to structure their participation in the National Environmental Policy Act process so that it is meaningful and alerts the agency to the reviewers' position and contentions [citing *Vermont Yankee, Id.*]. Environmental

> objections that could have been raised at the draft stage may be waived if not raised until after completion of the FEIS (*City of Angoon v. Hodel* (9th Circuit, 1986) and *Wisconsin Heritages, Inc. v. Harris*, 490 F. Supp. 1334 1338 (E.D. Wis. 1980). Comments on the DEIS should be specific and should address the adequacy of the statement and the merits of the alternatives discussed (40 Code of Federal Regulations 1503.3)."

However, while the Supreme Court has been quite adamant about this rule, it also stated that the primary burden of compliance with NEPA falls on federal agencies and that and "an EA's or an EIS' flaws might be so obvious that there is no need for a commentator to point them out specifically in order to preserve its ability to challenge a proposed action.". *Department of Transportation v. Public Citizen*, 541 U.S. 752, 765 (2004). This ensures that agencies are not tempted to shirk their statutory responsibilities, producing shoddy or grossly inadequate draft analysis and correcting it only if members of the public can find the time to uncover and identify the deficiencies. The reach of this provision to all other laws, including laws that trigger requirements not included under the purview of NEPA, including laws that do not even have an opportunity for public comment, is extremely troubling.

Second, the bill institutes a 180 day statute of limitations for claims arising under federal law challenging a permit, license of approval, unless a shorter time is specified in underlying law. Again, the reach of this provision sweeps across dozens of statutes, some of which include mandated notice requirements prior to filing judicial review and/or administrative appeals processes that must be exhausted prior to seeking judicial review. It also extends to independent regulatory agencies, such as the Nuclear Regulatory Commission, that have formal administrative proceedings with particular time periods that would apparently be swept aside by this provision. In short, it overrides dozens of established agency procedures, appeal processes, and the exhaustion of administrative remedy doctrine and would leave many agencies such as the Nuclear Regulatory Commission, the Federal Energy Regulatory Commission, the Bureau of Land Management and other agencies faced with revamping their own processes in accordance with their authorizing statutes and current administrative processes.[11] Among the troubling consequences of such a provision are the potential to force members of the public into court precipitously, to preserve their rights before they know whether there is any real need for litigation.

Conclusion

In summary, this bill raises a number of serious concerns. It would:

- Promote or mandate project approvals regardless of the public interest;
- Create confusion, delay and litigation caused by unclear statutory language and conflicts with numerous environmental and non-environmental laws
- Turn over government functions to private entities with inherent conflicts of interests

[11] While there is a 180 day statute of limitations for NEPA claims under the Safe, Accountable, Flexible, Efficient Transportation Equity Act, the current transportation authorization act, that provision, tailored to the federal and state highway processes, does not pose the same problems that this approach would for many other agencies. For one thing, there is no administrative appeals process in the context of highway construction.

- Impose "one size fits all" solutions that don't address the cause of the issue being "solved".

I hope that these comments are of assistance to the Subcommittee, and would be pleased to answere any questions that the Subcommittee may have on the subject of H.R. 4377.

TESTIMONY OF JOHN D. WALKE

CLEAN AIR DIRECTOR

NATURAL RESOURCES DEFENSE COUNCIL

HEARING ON H.R. 1493, "SUNSHINE FOR REGULATORY DECREES AND SETTLEMENTS ACT OF 2013"

BEFORE THE SUBCOMMITTEE ON REGULATORY REFORM, COMMERCIAL AND ANTITRUST LAW, COMMITTEE ON THE JUDICIARY

U.S. HOUSE OF REPRESENTATIVES

June 5, 2013

Thank you, Chairman Bachus and Vice Chairman Farenthold, and Ranking Member Cohen for the opportunity to testify today. My name is John Walke, and I am clean air director and senior attorney for the Natural Resources Defense Council (NRDC). NRDC is a nonprofit organization of scientists, lawyers, and environmental specialists dedicated to protecting public health and the environment. Founded in 1970, NRDC has more than 1.3 million members and online activists nationwide, served from offices in New York, Washington, Los Angeles, San Francisco, Chicago, and Beijing.

I have worked at NRDC since 2000. Before that I was a Clean Air Act attorney in the Office of General Counsel for the U.S. Environmental Protection Agency (EPA). Prior to that I was an attorney in private practice where I represented corporations, industry trade associations and individuals. Working in each of these three capacities, I have represented my clients in lawsuits that resulted in settlement agreements or consent decrees involving the EPA. My testimony today draws upon these different experiences as well as the experiences of other NRDC attorneys.

H.R. 1493, the Sunshine for Regulatory Decrees and Settlements Act of 2013, arises out of the baseless belief that government lawyers engage in "sue and settle" litigation strategies. The "sue and settle" expression alleges that government agencies seek to limit their discretion by colluding with plaintiffs to settle cases. This suggestion is squarely at odds with NRDC's experience, as well as my own experience as a private practitioner and government attorney. In litigation against the United States over four decades, NRDC attorneys have observed that Department of Justice and agency attorneys zealously advocate for the government's position. This has been true under both Democratic and Republican administrations.

Moreover, we fail to see real world evidence of the "sue and settle" phenomenon. A careful examination of the record, including testimony by witnesses for the majority at last year's hearing[1] for H.R. 1493's predecessor, H.R. 3862,[2] fails to establish real world problems that would justify this harmful and heavy-handed legislation. H.R. 1493 purports to solve problems that do not actually exist. It is a fundamentally flawed piece of legislation that we urge the subcommittee to oppose for the reasons discussed below.

Lack of Factual Foundation for Charges

The premise of the legislation is unfounded and indeed unsubstantiated. The "sue and settle" allegations implicit in the bill and reflected in last year's hearing testimony on H.R. 3862 amount to serious charges of intentional wrongdoing — that federal agencies and third parties conspire to settle litigation to advance untoward policy and legal objectives.

Yet last year's testimony on H.R. 1493's predecessor is devoid of any evidence whatsoever of that allegation. For example, majority witness Andrew Grossman of The Heritage Foundation asserted in his written testimony that "[i]n some cases, these [consent] decrees appear to be the result of collusion, where an agency shares the goals of those suing it and takes advantage of litigation to achieve those shared goals."[3] Nowhere

[1] *Hearing on H.R. 3041, the "Federal Consent Decree Fairness Act," and H.R. 3862, the "Sunshine for Regulatory Decrees and Settlements Act" Before the Subcomm. on Courts, Commerce and Admin. Law of the H. Comm. on the Judiciary*, 112th Cong. (Feb. 3, 2012) (hearing notice *available at* http://judiciary.house.gov/hearings/Hearings%202012/hear_0203012.html) ("Hearing on H.R. 3862").
[2] H.R. 3862, 112th Cong. (2012) *available at* http://www.gpo.gov/fdsys/pkg/BILLS-112hr3862rh/pdf/BILLS-112hr3862rh.pdf.
[3] Hearing on H.R. 3862 (Testimony of Andrew Grossman, Visiting Legal Fellow, The Heritage Foundation *available at* http://judiciary.house.gov/hearings/Hearings%202012/Grossman%2002032012.pdf). *See also, e.g.* the

in his written testimony, however, does Mr. Grossman furnish evidence backing this claim; the most he could muster was the weak statement that this "appear[s]" to be the case to him. Similarly, no other witnesses or members at the hearing offered proof that rose above their subjective interpretation or speculation. Unsubstantiated charges from those with an anti-regulatory political agenda should not form the basis for legislation.

Similarly, the office of Majority Leader Eric Cantor issued a report entitled "The Imperial Presidency"[4] that leveled the serious charge that the current administration engages in improper and possibly unconstitutional collusive litigation practices:

> The Obama Administration regularly relies on "sue-and-settle" tactics to avoid Congressional scrutiny and minimize public participation in the rulemaking process, while fast tracking the priorities of environmental groups. In practice, groups like the Sierra Club and the Natural Resources Defense Council will sue the EPA for failing to meet a nondiscretionary duty, usually a statutory deadline. Rather than fighting the lawsuit, EPA officials – many of whom used to work for the very groups that are now suing – will make enormous concessions in a settlement agreement that requires the agency to take a particular action. These settlement agreements are the product of closed-door negotiations between the EPA and environmental groups – states, industry, stakeholders, and the public have no voice in the process. Furthermore, these settlement agreements can be legally binding on future Administrations, raising serious constitutional concerns.

The first thing one notices when reading this passage is there is no evidence to support the charges. No facts, no examples, no footnotes.

The next striking thing is the basic irony that Majority Leader Cantor is arguing that the Executive Branch should defend in court to the bitter end its failure to comply with statutory deadlines set by Congress, since statutory deadlines are overwhelmingly the "nondiscretionary duties" at issue in government consent decrees and settlements. If Congress does not like a statutory deadline, it can change it. If Congress no longer supports statutory programs, it may amend them. But statutory deadlines and requirements are the law, and Congress surely does not want the Executive Branch to violate a duly enacted law. An administration that defied congressionally enacted deadlines or other provisions, even when sued to comply with them, would be thumbing

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majority report accompanying H.R. 3862 *available at* http://www.gpo.gov/fdsys/pkg/CRPT-112hrpt593/pdf/CRPT-112hrpt593.pdf.

[4] The Office of Majority Leader Eric Cantor, *The Imperial Presidency: Implications for Economic Growth and Job Creation*, at 23 *available at* http://majorityleader.gov/theimperialpresidency/files/The-Imperial-Presidency-Majority-Leader-Eric-Cantor%27s-Office.pdf.

its nose at Congress—intruding on congressional prerogatives—not the other way around.

Most striking of all is the consistent failure in Majority Leader Cantor's report and elsewhere by critics of agency settlements and consent decrees to identify instances of collusion or other impropriety, notwithstanding an entire political narrative developing without supportive facts. Critics have not identified settlements that dictated particular regulatory outcomes by skirting required administrative rulemakings. Conservative authors of editorials, op-eds and blogs have taken up this narrative without so much as the barest facts to support the charges.[5] The U.S. Chamber of Commerce recently issued an entire report[6] on this subject and was unable to identify any evidence of collusion, conspiracy or agencies manipulating settlements or laws to carry out improper exercises of authority. My testimony examines the Chamber Report in greater detail below.

Shifting Arguments

Faced with the inability to identify collusion or impropriety and the dilemma this represents for their agenda, critics have resorted to shifting their arguments and re-defining what the term "sue-and-settle" means. The Chamber of Commerce report provides a particularly stark example of this shell game.

The Chamber chose a "sue-and-settle" methodology for its report that consists of Internet searches identifying all cases in which EPA and an environmental group entered into a consent decree or settlement agreement between 2009 and 2012. One cannot help noticing the report's slanted, partisan failure to examine any settlements between EPA and industry parties or conservative organizations, or any settlements involving the Bush administration. EPA regularly enters into settlements with industry parties, and I provide a list of illustrative examples in a footnote to my testimony.[7] Had the Chamber examined settlements prior to 2009, the results would have disclosed that the Bush administration

[5] See, *e.g.*, Op-Ed., *EPA's back-room 'sue and settle' deals require reform*, WASH. EXAMINER, May 25, 2013 *available at* http://washingtonexaminer.com/epas-back-room-sue-and-settle-deals-require-reform/article/2530505 & Op-Ed., *No more back-room deals between bureaucrats and liberal activists*, WASH. EXAMINER May 27, 2013, available *at* http://washingtonexaminer.com/national-editorial-no-more-back-room-deals-between-bureaucrats-and-liberal-activists/article/2530584 (last visited May 31, 2013) ("Washington Examiner Op Eds").

[6] U.S. Chamber of Commerce, *Sue and Settle: Regulating Behind Closed Doors*, May 2013 *available at* http://www.uschamber.com/sites/default/files/reports/SUEANDSETTLEREPORT-Final.pdf ("Chamber Report").

[7] See *infra* n. 37.

entered into settlements and consent decrees with environmental groups, industry, states and other organizations just like the present administration.

Most striking of all is that by merely compiling EPA settlements (with just environmental groups, under just this administration), the report's methodology[8] quietly dispenses with any need for proof of collusion or impropriety in consent decrees or settlement agreements. The Chamber cannot remotely back up the charge that collusion was involved in all of these settlements, or even in any of them, so the report does not even try.

It is not surprising that the Chamber's methodology found instances of settlements with EPA, since settlements are a common and long-accepted form of resolving litigation over clear legal violations under any administration. But the Chamber Report then proceeds to assert that these unremarkable facts are evidence of the collusion imagined by critics. As such, the Chamber Report redefines and significantly expands the already politically loaded sue-and-settle allegation to encompass settlements generally, precisely because there is no evidence of collusion.

The Chamber continues this argument-shifting tactic elsewhere in its report. The report reveals that one of the Chamber's grievances concerns not just settlements (lacking any evidence of impropriety), but even the basic legal rights of citizens (and corporations and states, among others) under various federal laws to hold government accountable when it breaks the law: "In the final analysis, Congress is also to blame . . . . Most of the sue and settle lawsuits were filed as citizen suits authorized under the various environmental statutes."[9]

These citizen suit authorities are one of the longest-standing and proudest features of modern administrative laws. Courts have recognized the importance of these suits, noting that they represent a "deliberate choice by Congress to widen citizen access to the courts, as a supplemental and effective assurance that [environmental laws] would be implemented and enforced."[10]

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[8] Chamber Report at 46-49.

[9] *Id.* at 8.

[10] *Natural Res. Def. Council v. Train*, 510 F.2d 692, 700 (1974); *See also Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 263 (1975) ("Congress has opted to rely heavily on private enforcement to implement public policy"); *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711, 737 (1987) (Blackmun, J., dissenting) (noting reasonable fees provisions of environmental laws "to encourage the enforcement of federal law through lawsuits filed by private persons").

The Chamber is taking aim not at collusion, for which it lacks any proof, but instead at this "deliberate choice by Congress." The Chamber is directly targeting the legal rights of citizens to hold government accountable by enforcing mandatory statutory duties that agencies have unlawfully delayed or entirely failed to execute. The reason for this targeting is plain. The Chamber dislikes the rights that Congress has conferred upon Americans to protect themselves against health and environmental hazards when the government fails in its obligations to do so. The Chamber so dislikes these citizens' rights because the result may mean that agencies are required to enforce the law, making some of the Chamber's members comply with health, safety and environmental standards.

Nondiscretionary Statutory Duties

Consent decrees between federal agencies like EPA and plaintiffs are most commonly lodged in federal district courts to address an agency's failure to perform a nondiscretionary (or mandatory) statutory duty under federal law. These nondiscretionary duties most frequently concern failure to meet one or more plain statutory deadlines.[11]

The Republican co-sponsors of the companion Senate bill, S. 714, recognize the nature of these legal obligations. They have noted that the settlement agreements and consent decrees targeted by their legislation "[t]ypically" arise in cases where "the defendant agency has failed to meet a mandatory statutory deadline for a new regulation or is alleged to have unreasonably delayed discretionary action."[12] In my experience, consent decrees with federal agencies overwhelmingly concern nondiscretionary statutory duties like legal deadlines, and settlements are entered into far less often for unreasonably delayed discretionary actions. Indeed, caselaw tells us that agencies like EPA routinely litigate unreasonable delay lawsuits rather than settling them, sometime winning such cases, sometimes losing them.[13]

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[11] See, *e.g.*, *American Lung Association et al., v. U.S. EPA,* No. 1:12-cv-00243, at 2 (D. D.C. Sept. 4, 2012) (consent decree in a "suit[] against EPA alleging that the Agency has failed to perform a nondiscretionary duty required by the Clean Air Act") ("$PM_{2.5}$ Consent Decree") *available at* http://switchboard.nrdc.org/blogs/jwalke/PM2.5%20consent%20decree.pdf; *American Nurses Assoc. et al. v. Johnson*, No. 1:08-cv-02198 (D. D.C. Dec. 18, 2008) (consent decree requiring action by EPA to issue final regulations relating to toxic air pollution from power plants).

[12] Press Release, Senator Chuck Grassley, "Regulatory Reform Initiative Seeks Sunshine, Accountability, and Pro-Jobs Environment," April 11, 2013 http://www.grassley.senate.gov/news/Article.cfm?RenderForPrint=1&customel_dataPageID_1502=45458 ("Senator Grassley Press Release").

[13] See, *e.g.*, *WildEarth Guardians et al., v. US EPA,* No. 11-02064 (D. D.C. Nov. 17, 2011) (Defendant EPA currently litigating case brought by WildEarth Guardian, Sierra Club, Earthjustice relating to air pollution from coal mines); *In re Natural Resources Defense Council*, 645 F.3d 400 (D.C. Cir. 2011)

There is a misconception that settlements to resolve agency failures to meet statutory deadlines pressure agencies to act hastily and sloppily. This is an unfounded concern. First and most obviously, agencies only consent to decrees and agree to settlements when the agency believes in good faith that it can meet the specified deadlines. Presenting settlements and decrees to judges for approval means an agency is making a representation to the court that it can satisfy the terms of the document. As with the absence of any proof of collusion, I have seen no evidence that agencies agreeing to deadlines in settlements are acting in bad faith or making misrepresentations to courts.

Second, settlement agreements and consent decrees also contain standard language allowing the parties to modify the agreements with mutual consent and court approval, or even for the agency to modify the agreement over the plaintiffs' objection if the court approves the modification.[14] In my experience, if the agency determines that it needs more time then deadlines in these agreements are extended.[15]

Finally, EPA has addressed this issue directly and corrected the misunderstanding that settlement deadlines pressure agencies. Republican Senators recently submitted questions to EPA Administrator nominee Gina McCarthy and asked whether "deadlines in settlements sometimes put extreme pressure on the EPA to act."[16] To the contrary, EPA responded: "Where EPA settles a mandatory duty lawsuit based on the Agency's failure to meet a statutory rulemaking deadline, the settlement agreement or consent decree *acts to relieve pressure on EPA* resulting from missed statutory deadlines by establishing extended time periods for agency action."[17]

(NRDC case in which FDA litigated, and won, case regarding regulation of bisphenol A); *Chicago Ass'n of Commerce and Industry v. U.S. EPA*.873 F.2d 1025 (7th Cir. 1989) (EPA litigated and won case regarding unreasonable delay on municipal waste agency application for sewage removal credits).

[14] See, *e.g.*, $PM_{2.5}$ Consent Decree, at 4, ¶ 6 ("The Parties may extend the deadline established in Paragraph 3 by written stipulation executed by counsel for all Parties and filed with the Court on or before the date of that deadline; such extension shall take effect immediately upon filing the stipulation. In addition, EPA reserves the right to file with the Court a motion seeking to modify any deadline or other obligation imposed on EPA by Paragraphs 3, 4, 5 or 14. EPA shall give Plaintiffs at least five business days' written notice before filing such a motion. Plaintiffs reserve their rights to oppose any such motion on any applicable grounds.") *available at* http://switchboard.nrdc.org/blogs/jwalke/PM2.5%20consent%20decree.pdf.

[15] Agencies may determine more time is needed due to unforeseen circumstances or last-minute crunches, often leading to relatively short extensions. See, *e.g.*, *American Nurses Assoc. et al. v. Johnson*, *supra* n. 11 (consent decree modified on Oct. 24, 2011, to allow final standards no later than Dec. 16, 2011).

[16] Senator Vitter, Questions for the Record, Gina McCarthy Confirmation Hearing, Environment and Public Works Committee, May 6, 2013, at p. 23 *available at* http://www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=9a1465d3-1490-4788-95d0-7d178b3dc320 ("Senator Vitter Questions").

[17] *Id.* (emphasis added).

Benefits of Enforcing Laws to Protect Health, Safety and the Environment

The statutory safeguards that federal agencies are bound to enforce with nondiscretionary duties and statutory deadlines exist to protect Americans' health, safety, natural environment, food supply, medication and other consumer products, and financial and investor interests. Let me list just two examples of the myriad ways that enforcing statutory deadlines through citizen suits have benefitted Americans:

- Enforcing the statutory deadline for long-overdue mercury and air toxics standards for power plants, which resulted in EPA adopting safeguards projected to avoid, *every year*:
  - Up to 11,000 premature deaths;
  - 2,800 incidents of chronic bronchitis;
  - 4,700 heart attacks;
  - 130,000 asthma attacks;
  - 5,700 hospital and ER visits; and
  - 3,200,000 restricted activity days.[18]

- Enforcing the statutory deadline for overdue clean air health standards for soot pollution (fine particles or $PM_{2.5}$), which resulted in EPA adopting safeguards projected to avoid, every year:
  - Up to 1,500 premature deaths;
  - Up to 800 heart attacks;
  - Up to 250,000 asthma attacks among children; and
  - Up to 570,000 restrict activity or lost work days.[19]

Anti-Enforcement Agenda

H.R. 1493 subverts the power of the judiciary as well as the obligation of the executive branch to enforce congressional enactments, as a means of skewing outcomes. It is quite revealing that the complaints at last year's Subcommittee hearing on H.R. 3862 were more about opposition to the underlying statutory mandates than to the vehicles for

[18] U.S. EPA, Fact Sheet: Mercury and Air Toxics Standards: Benefits and Costs of Cleaning Up Toxic Air Pollution from Power Plants, *available at* http://www.epa.gov/mats/pdfs/20111221MATSimpactsfs.pdf.
[19] U.S. EPA, Regulatory Impact Analysis for the Final Revisions to the National Ambient Air Quality Standards for Particulate Matter, *available at* http://www.epa.gov/ttn/ecas/regdata/RIAs/finalria.pdf, at 5-68 (Table 5-18).

enforcing those mandates. This opposition to the enforcement of mandatory statutory duties and substantive legal safeguards courses through the Chamber Report.[20]

H.R. 1493 creates the unprecedented legal opportunity for third party "intervenors" to obstruct settlement talks and prolong illegal, harmful actions when federal agencies are sued for violating federal laws. Specifically, the bill mandates that non-party intervenors be given the right to participate in federal agency settlement discussions. *See* Sec. 3(b) and (c). The bill then mandates that all settlement discussions be conducted only pursuant to time-consuming and open-ended mediation programs administration by the federal courts. (The bill carefully avoids placing any time limits on this mediation mandate.) *See* Sec. 3(c). This unprecedented elimination of informal settlement opportunities and the speedier resolution of lawsuits, provides intervenors with legally rejected[21] and heretofore unheard of opportunities to disrupt and obstruct the settlement of lawsuits that the government believes should not be defended in court.

This extreme approach would give industry intervenors the right to participate in and prolong settlement discussions to argue that agencies like the EPA have not broken the law—even when agencies admit that they have, and when it is inescapable that they have. These industry intervenors would be granted the opportunity to oppose rulemakings and schedules to remedy the legal violations, over the objections of injured plaintiffs, even when the agency is willing to follow the law and correct its illegal behavior. I discuss this feature of the bill more extensively in the section-by-section bill analysis on pages 20-24.

By targeting citizen suits, settlements, and longstanding judicial processes and caselaw, H.R. 1493 absolutely would make it harder to ensure that the federal government does not break the law or faces required legal remedies when it does. Notably, the bill includes no measures to ensure that the federal government does not break the law or that it faces the appropriate consequences when it does. Instead, the bill is a one-way ratchet weakening law enforcement.

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[20] See generally Chamber Report; Senator Grassley Press Release, *supra* n. 12; Senator Vitter Questions *supra* n. 16; Washington Examiner Op-Eds, *supra* n. 5.

[21] On pages 16-17 of this testimony, I discuss a Supreme Court decision that would be overturned by this aspect of the legislation. That decision declared that "[i]t has never been supposed that one party—whether an original party, a party that was joined later, or an intervenor could preclude other parties from settling their own disputes and thereby withdrawing from litigation." *Local Number 93 v. City of Cleveland*, 478 U.S. 501, 528-29 (1986).

Disruption of Judicial Processes

The bill also creates new procedural obstacles to resolving litigation early in the process, wasting the time and resources of litigants and the courts and conflicting directly with the expressly stated and longstanding policy of the federal judiciary. The advisory committee notes to Federal Rule of Evidence 408 specifically invoke "the public policy favoring the compromise and settlement of disputes."[22]

Above all, H.R. 1493 ignores the role of the judiciary in resolving disputes by ignoring the reason that many of these consent decrees occur in the first place. In drafting legislation, Congress sets deadlines and priorities when it directs agencies to undertake certain rulemakings. When these deadlines are missed, it is the proper role of the judiciary to ensure that laws, as written by Congress and signed into law by the president, are properly enforced.[23] The proper role of the judiciary is to enforce the statutory deadlines set and written into law by Congress rather than further impede the agency from meeting these deadlines. Preventing the judiciary from enforcing statutory deadlines is not an appropriate way to alter the regulatory system, and would gradually turn regulatory statutes into dead letters.

This bill, and the majority witnesses' prior testimony, would have one believe that these radical shifts in the balance of power are costless and serve only to increase transparency in agency decision-making. This could not be further from the truth. This legislation creates a judiciary that is required to obstruct settlement agreements and consent decrees, increasing transaction costs for all parties and the courts. This would mean less efficiency, flexibility and timely enforcement of the law. Costly and protracted litigation would mean that agency wrongs—violations of congressional mandates, mind you—would take even longer to be rectified.

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[22] See FED. R. EVID. 408 advisory committee's note *available at* http ://www.law. cornell .edu/rules/fre/rule 408.

[23] Hearing on H.R. 3862, *supra* n. 1 (Statement of David Shoenbrod, Visiting Scholar, American Enterprise Institute) *available at* http://judiciary.house.gov/hearings/Hearings%202012/Schoenbrod%2002032012.pdf; *See also* Richard J. Lazarus, *The Tragedy of Distrust in the Implementation of Federal Environmental Law*, 54 LAW & CONTEMPORARY PROBLEMS 311, 323 (1991) (showing that EPA meets only a small percentage of statutory deadlines).

Existing Safeguards and Public Participation Opportunities

H.R. 1493 ignores the legal mechanisms already in place to ensure transparency, public participation, and an agency's maintenance of its discretionary powers and legal responsibilities. Notably, the witnesses for the majority at last year's hearing on H.R. 3862 praise these existing mechanisms at length in their testimony. At last year's hearing, Mr. Grossman lauded the so-called "Meese Policy" as an exemplary non-partisan approach that recognizes the appropriate place for the Executive Branch of government, yet he failed to acknowledge current practices that limit what the federal government can agree to when it enters into consent decrees or settlements regarding discretionary duties.[24]

Roger Martella, another witness[25] for the majority at the H.R. 3862 hearing, also praises current administrative processes, identifying "every significant administrative law initiative" as having "three inexorable components: the agency's proposed rule, the final rule, and the litigation by the loser in the rulemaking."[26] Moreover, Mr. Martella does not think "we can or should endeavor to change those components."[27] As Mr. Martella highlights, in the rulemaking context an agency may not evade or subvert required notice and comment rulemaking procedures through a consent decree or settlement.

Notably, no witness at last year's hearing for H.R. 3862 identified rules that followed settlements with agencies and did not go through public notice and comment under the Administrative Procedure Act before taking effect. For today's hearing, the witnesses should be asked whether they can identify any such examples of rules that skirted required APA procedures and, if so, whether those actions escaped judicial review.

American Nurses Association v. Jackson, a case cited by both Mr. Grossman in his testimony on H.R. 3862 last year and in the Chamber Report, provides a perfect example of these procedures. I feel compelled to address this case at some length to rebut the

[24] Memorandum from Edwin Meese III, Attorney General, to All Assistant Attorneys General and All United States Attorneys (Mar. 13, 1986); See also Memorandum from Randolph D. Moss, Acting Assistant Attorney General Office of Legal Counsel, for Raymond C. Fisher, Associate Attorney General (June 15, 1999) available at http://www.justice.gov/olc/consent decrees2.hm; 28 C.F.R. Subpt. Y (2012).
[25] Hearing on H.R. 3862, *supra* n. 1 (Statement of Roger R. Martella, Jr., Sidley Austin LLP, "Addressing Off Ramp Settlements: How Legislation Can Ensure Transparency, Public Participation, and Judicial Review in Rulemaking Activity,") *available at* http://judiciary.house.gov/hearings/Hearings%202012/Martella%2002032012.pdf.
[26] *Id.* at 1.
[27] *Id.*

Chamber's and Mr. Grossman's unfounded charges since NRDC was a plaintiff in that lawsuit. In that case, the EPA merely agreed to propose standards by a certain date and to finalize standards by a later date. No particular outcomes or substantive positions were mandated by the consent decree. The agency provided a formal comment period of 90 days on the proposed standards, but made the proposal publicly available for nearly 140 days before that comment period closed. And the consent decree was open to being modified jointly by the parties or unilaterally by the agency (with court approval), a common feature of agency consent decrees.[28] Further, section 113(g) of the Clean Air Act requires that the agency take public comment on consent decrees, providing yet another opportunity for public input.[29]

Moreover, what Mr. Grossman and the Chamber fail to note is that the clean air standards at issue in the consent decree already were over a decade overdue based on deadlines for action that Congress itself had set when amending the Clean Air Act in 1990. EPA had violated a nondiscretionary duty to issue these standards by a statutory deadline, the agency acknowledged that it had missed this statutory deadline, and the court would not have approved the consent decree had the court not agreed that EPA had violated a nondiscretionary statutory duty.[30] Mr. Grossman's testimony leveled complaints at the EPA mercury and air toxics standards, but these are all the same issues that industry raised during the comment period and are currently raising in court to challenge the final standards. This proves the point, echoed in Mr. Martella's statement, that existing administrative and judicial processes provide opportunities for public participation and the full exercise of legal rights, without the need for misconceived legislation like H.R. 1493.

Mr. Grossman represented groups opposed to the *American Nurses Association* consent decree and unsurprisingly he repeated that opposition in last year's testimony; but at bottom his disagreement is over the substance of the Clean Air Act's standards, not any procedural failings. The requirement to issue the standards originated with Congress (author of the 1990 Clean Air Act amendments) and was simply enforced by citizens and the courts.

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[28] *See supra* n. 11.

[29] Clean Air Act section 113(g), 42 U.S.C. §7413(g) (2013).

[30] Shortly before promulgation of the final regulations at issue in the consent decree, industry intervenors sought to interfere with the decree and unilaterally alter its terms to delay those regulations by a year. The court rejected that industry motion. When the industry intervenors sought to re-file an essentially identical motion a short while later, Mr. Grossman filed a brief supporting the industry intervenors. The court did not even bother to rule on that repetitive motion, making clear it was no more meritorious than the first one.

Some members of Congress opposed the mercury and air toxics standards in the 112th Congress, but several House bills to void these standards did not become law[31] and a Congressional Review Act resolution of disapproval aimed at the standards failed in the Senate.[32] Harmful legislation like H.R. 1493 should not be used to obstruct enforcement of laws that Congress chooses not to amend or repeal through regular legislative amendments.

EPA Settlements with Industry Parties

It is instructive to examine some of the many settlement agreements that EPA enters into with corporations or industry trade associations, because these settlements confound the sue-and-settle mythology and undermine the basis for H.R. 1493. What one finds in the creation and content of some of these settlements with industry is strikingly similar to settlement agreements with non-industry parties.

First, EPA concludes that it makes more sense to settle a lawsuit brought by industry rather than litigate the case, after the agency weighs the defensibility of its legal stance, the expenditure of resources, and the certainty provided by settling. Second, EPA enters into private discussions with the industry plaintiffs to craft a settlement agreement. (When parties to an EPA lawsuit are public health groups, industry critics hypocritically and pejoratively dub these talks "back-room negotiations.")[33] These private settlement talks do not include intervenors or non-industry parties.

Third, EPA frequently agrees to deadlines to propose and finalize rulemakings (just like in settlements with non-industry parties).[34] EPA commits to schedules that it can represent to the court the agency will satisfy. The settlements contain standard language allowing EPA to seek extensions in these deadlines, with mutual consent of the parties or via unilateral agency motion if the court approves the extension.[35]

Fourth, EPA then often agrees to take comment in future proposed rulemakings on specific measures included as terms in the industry settlements.[36] One actually observes

[31] Transparency in Regulatory Analysis of Impacts to the Nation, H.R. 2401, 112th Cong. (2012).
[32] S.J. Res. 37, 112th Cong. (2012).
[33] See, *e.g.*, U.S. Chamber of Commerce, *Sue and Settle: Regulating Behind Closed Doors*.
[34] See, *e.g.*, *infra* n. 37.
[35] *See, e.g., EnerNOC, Inc. v. U.S. EPA*., 2013 WL 655313 (D.C. Cir. Feb. 6, 2013) (Obama EPA settlement agreement described *infra* n. 37 modified twice); *Engine Mfrs. Ass'n v. U.S. EPA*, 2006 WL 1825298 (D.C. Cir. June 16, 2006) (¶3: " The parties may extend the dates set forth in Paragraphs 1 and 2, or otherwise modify this Agreement").
[36] *See, e.g., Am. Petroleum Inst. v. U.S. EPA*, No. 95-1098 (D.C. Cir. Feb. 9, 1995) *infra* n. 37.

this practice more in EPA settlements with industry than in settlements with public health groups.[37] The reason is that industry litigants often have very specific regulatory approaches or test methods that they want EPA to present for comment in proposed rulemakings. This practice inches closer to the line that critics charge (erroneously) that EPA crosses in settlements with public health groups: committing to substantive regulatory outcomes in settlement agreements. But in these industry settlements just as in those with public health groups, EPA does not cross that line: agreeing to take comment on a very specific proposed regulatory outcome "substantially similar" to the terms in a settlement agreement still preserves the EPA Administrator's discretion to reach different decisions in final rules. And it still preserves the rights of the public to comment on and oppose the proposal reflecting that industry-preferred outcome.

Fifth, as discussed above, the subsequent proposed and final rulemakings satisfy all procedural requirements under the APA and the pertinent organic statutes—just as with rulemakings following settlements with health and environmental organizations.

There is nothing improper about this sequence of events. EPA and the industry plaintiffs are using long-accepted and even favored judicial tools. Industry is resorting to lawsuits under statutory citizen suit authorities and reaching private settlements with a federal agency to vindicate the industry plaintiff's legal interests. The settlements do not include intervenors. But they do not harm non-parties because the agency is not limiting its legal discretion, it is not committing to substantive outcomes, and the agency is not bypassing procedural requirements for public participation in rulemakings.

Chamber of Commerce Report

The Chamber Report takes aim at the Obama administration and accuses federal agencies of engaging in collusive litigation practices with public interest groups (a practice they disparage as "sue-and-settle" litigation). As discussed above, the very methodology of the Chamber report reveals its misleading nature because it merely

[37] *See, e.g., Am. Petroleum Inst. v. U.S. EPA,* No. 95-1098 (D.C. Cir. Feb. 9, 1995) (Clinton EPA settlement agreement with American Petroleum Institute agreeing to propose and take comment on amendment to certain federal regulations); *Engine Mfrs. Ass'n v. U.S. EPA*, 2006 WL 1825298 (D.C. Cir. June 16, 2006) (Bush EPA settlement agreement with a number of industry groups to propose, and one year later finalize, standards relating to heavy duty diesel engines);; *Wisconsin Builders Assoc. v. U.S. EPA,* No. 09-4113 (7th Cir. Dec. 28, 2009) (Obama EPA settlement agreement with industry groups requiring proposed final rule, comment period, and final rule); *EnerNOC, Inc. v. U.S. EPA*., 2013 WL 655313 (D.C. Cir. Feb. 6, 2013) (Obama EPA settlement agreement requiring proposed and final rulemakings by certain dates).

compiles settlements with one type of private party whose views the Chamber does not share.

Early on, the report authors slip and reveal one of the secrets behind the Chamber's political enterprise. The Chamber confesses that its "major concern" is that agency settlements with private parties "will spread to other complex statutes that have *statutorily imposed dates* for issuing regulations."[38]

This tells us that the Chamber knows what's really going on and why it is resorting to misrepresentation throughout its report. Namely, the Chamber understands that the agencies it excoriates are entering into settlements and consent decrees to carry out statutorily required obligations for which the agencies lack discretion.

Here are some of the core falsehoods in the Chamber Report.

Chamber Fiction: "Perhaps the most significant impact of these sue and settle agreements is that by freely giving away its discretion in order to satisfy private parties, an agency uses congressionally appropriated funds to achieve the demands of private parties."[39]

Facts: The legal obligations in these agreements involve nondiscretionary duties written into laws passed by Congress. Agencies lack discretion as a matter of law to ignore or contravene these mandatory statutory duties. Most of these obligations concern statutory deadlines. For example, the Clean Air Act requires[40] EPA to review national air quality standards every five years. The Chamber Report does not begin to explain where EPA enjoys discretion to miss this deadline, even though the report lists this as a prime example where EPA has discretion to do something other than what the law says.[41]

Indeed, the Clean Air Act spells out in unmistakable language the basis for citizen suit lawsuits against the government: lawsuits in federal district court are permitted only when the act or duty to be performed by the EPA Administrator is "not discretionary."[42] The report's misrepresentation of nondiscretionary statutory duties for agencies ends up confirming the Chamber's agenda to prolong government violations of statutory health and safety obligations.

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[38] Chamber Report, at 7 (emphasis added).
[39] *Id.*
[40] Clean Air Act section 109, 42 U.S.C. §7409 (2013) *available at* http://www.law.cornell.edu/uscode/text/42/7409.
[41] Chamber Report, at 43.
[42] Clean Air Act section 304(a), 42 U.S.C. §7604(a) (2013) *available at* http://www.law.cornell.edu/uscode/text/42/7604.

Take a recent EPA consent decree relating to soot pollution (fine particulate) standards[43] from the Chamber's hit list.[44] EPA agreed to a date to finalize its review of air quality standards for soot pollution, after the agency missed the mandatory 5-year deadline. The decree contains the following language—typically included in similar decrees—that suggests that the Chamber might not even be reading the settlements it condemns for allegedly stripping agencies of legally preserved discretion:

> Nothing in this Consent Decree shall be construed to limit, expand, or otherwise modify the discretion accorded to EPA by the Clean Air Act or by general principles of administrative law, including the discretion to alter, amend or revise any final action EPA takes [relating to soot standards], except the deadline specified therein. EPA's obligation to [revise soot standards] by the times specified therein does not constitute a limitation, expansion or other modification of EPA's discretion within the meaning of this paragraph.

Amazingly, the Chamber report highlights *this* consent decree as one in which EPA is denied discretion and rule outcomes are dictated.[45] This is demonstrably wrong.

Chamber Fiction: "The practice of agencies entering into voluntary agreements with private parties to issue specific rulemaking requirements also severely undercuts agency compliance with the Administrative Procedure Act . . . "[46]

Facts: The Chamber does not begin to show that the entry of a settlement agreement or consent decree violated administrative laws in the report's catalogue of examined cases.[47] Nor does the report back its charge that the agreements in these cases committed agencies to adopt specific rulemaking requirements that violated administrative laws. The report resorts to mere assertions again and again because the Chamber knows (or should know) that its claims are legally unsupported.

The Chamber Report proposes to "fix" these problems through promoting legislation such as H.R. 1493. However, the "Sunshine for Regulatory Decrees and Settlements Act of 2013" is a dangerous piece of legislation. In addition to obstructing enforcement of safeguards, flouting traditional concepts of separation of powers and limiting the role of the judiciary, the proposed legislation casually overturns controlling

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[43] $PM_{2.5}$ Consent Decree, *available at* http://switchboard.nrdc.org/blogs/jwalke/PM2.5 consent decree.pdf.
[44] Chamber Report, at 43.
[45] *Id.* at 19.
[46] *Id.* at 6.
[47] *Id.* at 30-42.

Supreme Court precedent. In *Local Number 93 v. City of Cleveland*, 478 U.S. 501, 528-29 (1986), the Court stated that:

> It has never been supposed that one party – whether an original party, a party that was joined later, or an intervenor – could preclude other parties from settling their own disputes and thereby withdrawing from litigation. Thus, while an intervenor is entitled to present evidence and have its objections heard at the hearings on whether to approve a consent decree, it does not have power to block the decree merely by withholding its consent.

The Chamber dislikes this established legal understanding because it prevents industry intervenors from obstructing agency decisions to follow statutory obligations that some of the Chamber's member corporations might wish to remain unenforced.

So let's review the list of villains in the Chamber Report:

- Congress is to blame for its nerve in giving citizens the right to hold government accountable when federal agencies break laws: "In the final analysis, Congress is also to blame . . . Most of the sue and settle lawsuits were filed as citizen suits authorized under the various environmental statutes."[48]
- The courts are to blame for "rubber stamping" agency agreements that remedy government agencies' law-breaking. The Chamber even charges that "generally it does not matter to courts if the decree or agreement is not required or authorized by statute."[49] This is a very serious charge, made all the more outrageous by the Chamber's absolute failure to substantiate it. The report identifies no instances of courts approving consent decrees or agreements requiring agencies to undertake actions contrary to statutes.
- And finally, of course, citizens and public health groups are to blame for having the nerve to hold government accountable, enforcing laws passed by Congress using means long authorized by Congress.

One will have anticipated this by now, but who remains blameless? The Chamber and its member corporations. They are only demanding the right to obstruct enforcement of laws on the books. They are only seeking to allow harmful levels of pollution and financial abuses to continue because they don't like the laws that curtail these harms. The Chamber and its member corporations are happy to vindicate their legal interests by entering into settlements with federal agencies.

[48] Chamber Report at 8.
[49] *Id.* at 4.

In the final analysis, the Chamber of Commerce report ends up being a thinly veiled attempt to promote a political agenda to obstruct enforcement of legal safeguards that protect Americans against harmful corporate activities.

EPA Consent Decree Concerning Air Toxics Standards for Brick Manufacturers

One of the majority's witnesses for today's hearing, Mr. Allen Puckett, is President and CEO of the company Columbus Brick Co. Columbus Brick submitted comments opposing an EPA consent decree addressing Clean Air Act air toxics standards for "brick and structural clay products manufacturing facilities". It is instructive to review the facts associated with this consent decree to understand how the public is harmed by the failure to enforce the law (or worse), and to examine how consent decrees begin to remedy those harms, albeit belatedly. As I will show, the actual facts associated with this consent decree don't even fit the story line of "sue-and-settle" collusion.

The Clean Air Act required EPA to adopt standards reducing toxic air pollution, including carcinogens like arsenic and chromium, from the brick manufacturing industry no later than November 15, 2000.[50] EPA did not get around to issuing those standards until 2003. In 2007, the D.C. Circuit Court of Appeals vacated those standards for being unlawfully weak and unprotective and remanded the rulemaking to EPA for further proceedings.[51]

In unusually pointed language, the judges rebuked EPA for defying the court's legal precedents by relying upon the same deregulatory legal arguments in the brick case that the court had already rejected repeatedly.[52] The industry should not have been surprised by this decision, given previous court rulings on the same dispositive legal issue.

As a result of the prior administration's unlawful actions, and the *vacatur* of the standards, there currently are no federal air toxics standards in place for brick manufacturers. The industry is in the 13th year past the time that Congress expected toxic pollution from these industrial facilities to be covered by Clean Air Act standards.

[50] 42 U.S.C. § 7412(e).
[51] *Sierra Club v. EPA*, 479 F.3d 875 (D.C.Cir. 2007).
[52] *Id.* at 884 ("If the Environmental Protection Agency disagrees with the Clean Air Act's requirements for setting emissions standards, it should take its concerns to Congress. If EPA disagrees with this court's interpretation of the Clean Air Act, it should seek rehearing *en banc* or file a petition for a writ of certiorari. In the meantime, it must obey the Clean Air Act as written by Congress and interpreted by this court.")

In 2008, when EPA had not so much as proposed brick toxic standards that were by then eight years overdue, the Sierra Club filed a lawsuit over EPA's failure to perform a nondiscretionary statutory duty and promulgate standards by the required 2000 deadline.[53] EPA then moved to dismiss the Sierra Club's lawsuit, with the agency having the chutzpah to argue that the plaintiff's lawsuit was *too late* and the case should be dismissed under the federal statute of limitations. The court denied the EPA motion. Only after that court ruling—leaving EPA with no defense to its failure to meet the nondiscretionary statutory deadline—did the agency then agree to enter into settlement discussions with the plaintiffs. This is hardly an example of "sue-and-settle" collusion.

EPA published the consent decree for public comment in accordance with the Clean Air Act. Columbus Brick opposed the consent decree and urged that the schedule for issuing the long overdue standards be delayed further.[54] The company's primary argument was that "there is not enough time for EPA to develop health-based standards, which allow EPA to tailor the level of the standard so that it protects health without imposing unnecessarily stringent standards."[55]

As a clean-air attorney working on air toxic standards for over 15 years, allow me to translate what a "health-based standard" is. It is an *exemption* from the law's rigorous technology-based air toxics standards to which all other industries are subject. EPA has never adopted such an exemption for the toxic pollution emitted by brick manufacturers, for the simple reason that neither the law nor science justifies such exemption. Notably, not even the Bush administration adopted this exemption for brick standards that were vacated in 2007. At any rate, EPA has had at least six years since 2007 to develop such an exemption if it cared to, and the agency has given no sign that it believes such an exemption is warranted.[56]

This industry-specific, situational desire for an exemption is unjustified under the Clean Air Act on multiple grounds. But it is a far cry from providing any justification for the harmful legislation that is the subject of today's hearing. The brick manufacturing industry has been effectively exempt from the rigorous safeguards required by the Clean

[53] *Sierra Club v. U.S. EPA*, No. 1:08-cv-00424-RWR (D. D.C. Mar. 11, 2008) (Consent Decree entered on April 18, 2013).
[54] Letter from Alan Puckett III, Columbus Brick Company, to EPA Docket Center (Jan. 7, 2012).
[55] *Id.*
[56] While the name "health-based standard" may sound laudatory and desirable, it is in fact an exemption from the law's more rigorous standards; Congress intended the so-called "health-based standard" only for hazardous air pollutants with health thresholds below which no harms are known or believed to occur. The hazardous air pollutants that brick manufacturers want to exempt do not meet this standard. 42 U.S.C. § 7412(d)(4).

Air Act's toxics program for over 13 years, in clear violation of mandatory statutory duties given to EPA.

The American people have been subjected to excessive levels of highly toxic air pollution from brick manufacturers for far longer than the law allows, while other industries have been meeting required standards for one to two decades. The unfairness here is certainly not an *accelerated* rulemaking schedule. And the only thing that gives the public any assurance of seeing the law enforced and toxic pollution reduced will have resulted from the legal right that citizens have to hold government accountable: first with a lawsuit to overturn badly unlawful standards in 2007, and then to hold EPA accountable for failing to meet a nondiscretionary legal duty.

Section-by-Section Analysis of H.R. 1493

H.R. 1493 would lead to a series of harmful consequences that we hope are unintended. But the bill's fundamental flaw is that it offers irresponsible, ideological "solutions" to a problem that, as noted above, does not exist. Passage of H.R. 1493 would prolong litigation, undermine law enforcement and legal protections for health and safety, and further overburden the courts, creating incentives for unlawful agency activities.

Section 2: Definitions

The definitions for "covered consent decree" and "covered settlement agreement" reveal the incredible breadth and ill-considered design of H.R. 1493. These terms are broader than "covered civil action." For example, in addition to lawsuits against federal agencies contemplated in the definition of "covered civil action," the term "covered consent decree" also encompasses the following:

> (3) (B) any other consent decree that requires *agency action relating to a regulatory action* that affects the rights of--
>
> (i) private persons other than the person bringing the action; or
>
> (ii) a State, local, or tribal government.

This coverage sweeps in not only suits against government agencies for failure to meet deadlines or perform mandatory duties, but also an ill-defined and potentially much broader category of actions as well.

For example, this language would encompass consent decrees or settlements of actions to challenge permits issued by government agencies (including permits to individual sources where the agency has not delegated the state authority), including a company's challenges to its own permits. Settlement of a permitting dispute would require "agency action relating to a regulatory action…." This would result in intervenors—such as citizens groups, labor unions, or competitors to the company—being granted the legal right to participate in court-mediated settlement discussions involving the company and the federal permitting agency. These intervenors would have the opportunity to block and delay resolution of permitting disagreements, even if the company and permitting agency reached an agreement.

Another example of this provision's far-reaching disruption would include consent decrees or settlements involving government enforcement actions, including settlements favorable to corporate or municipal defendants. One common example under the Clean Water Act involves consent decrees that EPA negotiates with municipalities that violate the Act by discharging untreated sewage during overflow events. EPA and the Department of Justice frequently use negotiated consent decrees to relieve local governments of obligations associated with strict compliance with the Clean Water Act.

Environmental organizations sometimes challenge these decrees for their alleged leniency, often without success. H.R. 1493 now confers upon environmentalist-intervenors the legal right to derail settlements that EPA and municipalities have negotiated historically to relieve the latter of costlier compliance obligations. Now these intervenors can compel the municipalities and EPA to enter into open-ended mediation overseen by the courts, with the avowed purpose of blocking any settlements that relieve the local governments from strict compliance with the law. By opening up this Pandora's Box to differently motivated intervenors, this is what the authors of H.R. 1493 invite.

Section 3(a)(2)

Section 3(a)(2) prevents entry of a consent decree or a court's dismissal pursuant to a settlement agreement or consent decree, stating that "[a] party may not make a motion for entry of a covered consent decree or to dismiss a civil action pursuant to a covered settlement agreement until after the end of proceedings in accordance with paragraph (1) and subparagraphs (A) and (B) of paragraph (2) of subsection (d) or subsection (d)(3)(A), whichever is later." The section operates to prevent entry of a consent decree or settlement agreement until the federal agency publishes notice of a proposed consent decree, accepts comments, responds to those comments, and holds a

public hearing on the consent decree, if it chooses to. This provision ignores statutory mechanisms already in place in many statutes that require a version of just such procedures. However, by adding more procedural hoops in this provision and requiring that consent decrees and settlement agreements not be entered until whichever of these procedures is last completed, the bill would delay enforcement of federal statutes and the vindication of valid legal rights, while wasting public and judicial resources. As written, this provision could produce lengthy, even indefinite delays in litigation, with a corresponding burden on both the court and the parties'—including the taxpayers'—resources.

Section 3(b)

The presumption required by this section subverts the current understanding and evidentiary foundation regarding inadequate legal representation. Moreover, as noted above, it would upend Supreme Court precedent, as seen in *Local Number 93*. Section 3(c), below, continues this trend.

Section 3(c)

Section 3(c) subverts law enforcement and the rule of law. It allows parties that oppose such law enforcement the unprecedented opportunity to obstruct and delay requirements to follow federal law. Consider the situation in which a federal agency commits a gross violation of a federal law and a state challenges that lawbreaking in court. Today, the state and federal agency have the ability to resolve that obvious legal violation and to do so through a consent decree or settlement agreement, promptly, without wasting judicial resources, while ensuring federal law is upheld and the state's valid legal interests safeguarded.

Section 3(c) thwarts all of that. The bill anoints third parties that support the perpetuation of the grossly unlawful behavior with the right to obstruct and delay a plaintiff state's legal right to ensure that the law is followed and the plaintiff's valid interests protected. It matters not under the bill whether those plaintiffs are individuals, corporations, nongovernmental organizations or any special interest, nor does it matter whether those third party interests are illegitimate and illegal, or whether the plaintiff is prejudiced and harmed. In all cases in which these third parties gain intervenor status, courts must delay and deny enforcement of the law by referring the case to a mediation program or magistrate judge to "reach an agreement on a covered consent decree or

settlement agreement" that must include the plaintiff, defendant agency and all intervenors. Thus, the bill jettisons the proper enforcement of federal statutes and the rule of law into a purgatory of continuing lawlessness. And intervenor(s) dedicated to the perpetuation of illegal behavior are granted legal standing to negotiate, obstruct or delay the obligation to follow the law, over the strong objections of the injured plaintiff(s).

Exactly how do the bill's drafters imagine that settlement discussions will occur involving a defendant agency that broke the law but was willing to correct that wrongdoing; an intervenor committed (for whatever reason) to the continuing violation of the law and opposed to such correction; and a plaintiff whose interests and legal right concern the upholding of the law? This process will guarantee the prolonging of the illegal behavior and the continuing injury of the plaintiff.

Perversely, section 3(c) even forces plaintiffs to participate in costly mediation activities, with the bill making no provision for their costs to be paid, of course, thereby imposing an unprecedented legal and financial burden on the legitimate interests of states, individuals, businesses and other groups that want to ensure that the federal government follows the law. Requiring parties to enter into and pay for mediation could substantially burden the public right of access to the courts, and in doing so impinge on this fundamental First Amendment right. Section 3(c) fails to specify the duration of the mediation or any ability to opt out if the mediation is not working. In the real world all these defects are a recipe for failure and prolonged unlawfulness.

It bears emphasizing that the bill's indiscriminate anointment of intervenors to exercise this manner of obstruction and delay will harm plaintiff corporations, state and local governments, nonprofit groups and individuals alike, when they or their interests have been harmed by federal agency lawbreaking. The bill guarantees equal opportunity unfairness and injustice for all plaintiff classes seeking to uphold the law. Worse, the legislation inexplicably and irresponsibly sides with parties supporting continued lawbreaking against parties seeking to require the upholding of laws, legally protected interests, and the rule of law itself.

Section 3(d)(1)

This section, like section 3(a)(2), underscores the extent to which this bill ignores current mechanisms in the law that prevent parties to a lawsuit from interfering with the rights of nonparties. The bill entirely ignores existing statutes' relevant provisions that specifically allow for input from nonparties to a consent decree. For example, section 113(g) of the Clean Air Act requires that the EPA Administrator publish in the Federal

Register notice of a consent decree or settlement agreement 30 days before it is finalized. At that time, nonparties provide comments to the Administrator and Attorney General, who can then withhold his or her consent to the proposed order or agreement.

Section 3(d)(4)

Section 3(d)(4) creates the obligation to catalog all mandatory rulemaking duties and describe how certain consent degrees or settlement agreements "would affect the discharge of those duties." This provision would be extraordinarily burdensome and time consuming for agencies and the section has no clear limitation on this vague directive. The determination of what constitutes a mandatory duty is not without controversy, and the very creation of the catalogue contemplated by the section could be an extremely contentious and lengthy process. Further litigation over whether the agency has accurately listed these duties would result, and would further burden the courts, benefiting no one but lawyers.

Section 4

This section upsets longstanding Supreme Court precedent on the standards for modification of consent decrees, and allows a settlement to be second-guessed *de novo* merely because of "changed circumstances" or "the agency's obligations to fulfill other duties." This is a radical reformulation of modification procedures that will result in more intrusive court interference with the executive branch, rather than less, since the federal government has little control over the resolution of a case that goes to trial. This provision provides a lopsided benefit to defendant agencies in all cases that are settled, allowing agencies to effectively escape settlement agreements and consent decrees they did not care to go forward with. This furthers obstructs the enforcement of congressional enactments that may already be long overdue, and the legislation imposes no time limit on the ability of agencies seeking to escape legal obligations reflected in agreements and decrees.

COALITION FOR SENSIBLE SAFEGUARDS

February 27, 2015

The Honorable Tom Marino
Chairman
House of Representatives Subcommittee on
Regulatory Reform, Commercial & Antitrust Law
Washington, DC 20515

The Honorable Hank Johnson
Ranking Member
House of Representatives Subcommittee on
Regulatory Reform, Commercial & Antitrust Law
Washington, DC 20515

Re: The Sunshine for Regulatory Decrees and Settlements Act of 2015 (H.R. 712)

Dear Representative Marino and Representative Johnson:

The Coalition for Sensible Safeguards (CSS) strongly urges members of the subcommittee to oppose the Sunshine for Regulatory Decrees and Settlements Act of 2015 (H.R. 712). We are an alliance of more than 150 consumer, small business, labor, scientific, research, good government, faith, community, health, environmental, and public interest groups, as well as concerned individuals, joined in the belief that our country's system of regulatory safeguards provides a stable framework that secures our quality of life and paves the way for a sound economy that benefits us all.

Under the guise of improving "transparency," H.R. 712 would empower the opponents of particular regulatory safeguards to perpetuate unlawful agency inaction; it would do nothing to ensure agencies are actually following the legal deadlines previous Congresses wrote into laws. CSS urges you to protect the American public and the rule of law by opposing this counterproductive bill.

This so-called "sunshine" law has been promoted with fog and clouds. Most people would think that the issue is that agencies enter into agreements to finalize regulations the way the plaintiffs want. That is just not the case. Instead, the lawsuits require agencies to finalize regulations on a date in the future because the agency failed to meet a congressional directive to finalize a rule by a date certain.

By design, H.R. 712 would create a gauntlet of duplicative, burdensome, and time-consuming procedures that apply to settlements and decrees, once again slowing down the rulemaking process and preventing federal law from being effectively implemented. H.R. 712 would subject any "regulatory" decree or settlement to a lengthy new notice-and-comment process (even though agencies are already required to engage in a notice-and-comment process). It would also facilitate intervention by any individuals who declare they would be affected by the regulatory action in question and then include these parties in additional, court-supervised settlement talks.

It cannot be overstated that despite claims to the contrary, court-ordered settlements and decrees do not determine the ultimate substance of agency rules. In fact, a December 2014 Government Accountability Office (GAO) report surveyed settlements on major EPA rulemakings to see if there was a relationships

between rules pushed forward through settlements and the substantive content of the completed rules.[1] Their findings: settlements had no influence on the content of the final rules issued.

It is clear that the actual intent of H.R. 712 is simply to ensure that critical health and safety protections continue to be delayed – by undermining the ability of the public and public interest groups to use the courts to require agencies to carry out Congress' intent and meet the deadlines Congress has written into federal laws.

The Sunshine for Regulatory Decrees and Settlements Act is an assault on the public protections and safeguards required by the laws Congress passed to protect the health, safety, and welfare of all Americans. H.R. 712 would waste the limited time and resources of agencies, courts, and the American public. We strongly urge members of the subcommittee to oppose this bill.

Sincerely,

Katherine McFate, President and CEO
Center for Effective Government
Co-chair, Coalition for Sensible Safeguards

Robert Weissman, President
Public Citizen
Co-chair, Coalition for Sensible Safeguards

The Coalition for Sensible Safeguards is an alliance of consumer, labor, scientific, research, good government, faith, community, health, environmental, and public interest groups, as well as concerned individuals, joined in the belief that our country's system of regulatory safeguards provides a stable framework that secures our quality of life and paves the way for a sound economy that benefits us all.

[1] United States Government Accountability Office. (2014, December). *Environmental Litigation: Impact on Deadline Suites on EPA's Rulemaking Is Limited.* (Publication No. GAO-15-34)

COALITION FOR SENSIBLE SAFEGUARDS

February 27, 2015

The Honorable Tom Marino
Chairman
House of Representatives Subcommittee on
Regulatory Reform, Commercial & Antitrust Law
Washington, DC 20515

The Honorable Hank Johnson
Ranking Member
House of Representatives Subcommittee on
Regulatory Reform, Commercial & Antitrust Law
Washington, DC 20515

RE: The Searching for and Cutting Regulations that are Unnecessarily Burdensome Act of 2015

Dear Chairman Marino and Ranking Member Johnson:

The Coalition for Sensible Safeguards urges members of the subcommittee to oppose the Searching for and Cutting Regulations that are Unnecessarily Burdensome Act of 2015 (SCRUB Act). This complex bill would establish a new bureaucracy empowered to dismantle long-established public health and safety standards and would make it significantly more difficult for Congress and federal agencies to implement essential future protections.

The Dan River coal ash spill in North Carolina and the Freedom Industries chemical spill in West Virginia last year vividly demonstrate the continuing need for oversight and enforcement of safety standards. Our private industrial infrastructure is aging, increasing the risks of spills, leaks, and explosions that endanger whole communities. We should be looking for ways to strengthen oversight of these facilities, not weaken inspections and enforcement mechanisms. This legislation moves us in the wrong direction.

The SCRUB Act would establish a new "regulatory review" commission funded at taxpayer expense and charged with the identifying duplicative, redundant or so-called "obsolete" regulations to repeal, and would do nothing to identify the numerous gaps, shortfalls, and outdated regulatory standards that leave the public vulnerable to the next public health tragedy. Unless prohibited by authorizing legislation, agencies seek to develop regulations that consider the costs to affected industries while maximizing public benefits. But this commission would only consider the costs to affected industries while ignoring the benefits of oversight. Under the bill, the commission's goal to achieve a 15 percent reduction in the cumulative cost of regulations would result in the repeal of critical health, safety, and environmental safeguards, even *when the benefits of these rules are significant, appreciated by the public, and far outweigh the costs.*

Moreover, the commission would be redundant and duplicative since an existing Executive Order[1] already requires federal agencies to identify and remove outdated or ineffective regulations. The administration's retrospective review initiative, and its continuing work in this area, has significantly reduced the existing stock of unnecessary regulations. Thus, a new commission would be duplicative and expensive, and a costly waste of public funds.

To make matters worse, the legislation creates a "cut-go" system that is completely divorced from real issues. The legislation says that any agency that issues a new regulation would be required to remove an existing regulation of equal or greater cost. So if the science finds that a substance widely used in commerce is harmful to infants, regulators would have to find some other protection to cut before protecting young children. This one-size-fits-all approach is short-sighted and ties the hands of agency staff when public health crises or new threats occur.

Beyond hampering the ability of agencies to enforce existing laws, there is nothing in the legislation to ensure that the regulations that survive are the most beneficial to the public and maximize the net benefits to society. In fact, under the bill, an agency can select only rules identified by the commission for repeal, even if the agency has identified a rule that is better suited for elimination. Nor do the proposed "cut-go" procedures take into account the many regulations that are mandated by Congress with a statutory deadline or rules subject to court-ordered deadlines. The SCRUB Act makes it impossible for agencies to bypass the "cut-go" procedures, no matter how urgent the circumstances may be.

The American people are the ones who bear the human, emotional, and economic impacts of health and safety disasters that continue to occur far too often. This committee should be proactively looking for ways to hold those who violate regulatory safeguards fully accountable for their deeds, in order to reduce the likelihood of another tragedy. We can create a regulatory system that works for America's families, and encourages American businesses to run safe, forward–looking businesses. This legislation would not move us in that direction. We strongly urge opposition to the SCRUB Act.

Sincerely,

Katherine McFate, President and CEO
Center for Effective Government
Co-chair, Coalition for Sensible Safeguards

Robert Weissman, President
Public Citizen
Co-chair, Coalition for Sensible Safeguards

The Coalition for Sensible Safeguards is an alliance of consumer, labor, scientific, research, good government, faith, community, health, environmental, and public interest groups, as well as concerned individuals, joined in the belief that our country's system of regulatory safeguards provides a stable framework that secures our quality of life and paves the way for a sound economy that benefits us all.

[1] Exec. Order 13,563, 76 Fed. Reg. 3821 (Jan. 21, 2011).

Mr. JOHNSON. Thank you.

Mr. Kovacs, in your written testimony, it appears that you blame the delay in the Savannah River dredge project on the NEPA approval process, when in fact the delay was caused by funding that was not in place, and also a 2-year lawsuit by the State of South Carolina, which denied the permit to deepen the river channel. And that deepening had already been approved by the Army Corps of Engineers the lead agency overseeing the NEPA process.

So those things being true, how would the RAPID Act expedite the completion of the Savannah Harbor expansion project given the lack of Federal and State funding and the blocking of the project through the State regulatory action issues which were wholly unrelated to the NEPA approval process?

Mr. KOVACS. Well, that's an excellent question, thank you. One of the things that RAPID does and it——

Mr. JOHNSON. How would it how would it—the Savannah River project, how would it——

Mr. KOVACS. Savannah River, what happens in RAPID is by putting a time limit on it, 2 years, 3 years, whatever it is, a decision has to be made so that the developer can either decide to stay or go. One of the things——

Mr. JOHNSON. And so that decision would have to be made within the 2-year period regardless of what it was that was holding up the project moving forward, whether or not it be lack of funding, whether or not it be——

Mr. KOVACS. Well, for the environmental impact statement. I mean, for example, if you can't get through the environmental review process, you're not even going to even seek a permit.

Mr. JOHNSON. But I mean, assuming you get through the environmental review process, if there is some another reason that hangs the project up, the RAPID Act would force approval of the project.

Mr. KOVACS. Yeah, RAPID does not change any substantive law. What it does——

Mr. JOHNSON. Other than perhaps cause it not to be fulfilled.

Mr. KOVACS. Well, it sets up timeframes of 2 years or 3 years, depending upon how it is, and then it sets up—if the project is approved, it sets up the 6 months statute of limitations like you did in SAFETEA-LU and MAP-21 and the WRDA bill.

So as I understand what the Committee's trying to do with this legislation is to take existing structures that have worked, like SAFETEA-LU, that's been here now for 7, 8 years. It's worked. There have been no problems. It incorporated it in MAP-21, and it incorporated it in WRDA, and they're trying to put the timeline on it for the very simple reason——

Mr. JOHNSON. Well, and——

Mr. KOVACS [continuing]. That the developer's spending hundreds of millions of dollars just developing a project.

Mr. JOHNSON. And regardless of the cost to the—to the developer, there are some societal costs that would be incurred by failing to adhere to laws already in place, other laws that need to be followed, and the RAPID Act would be a super mandate that overrides all other laws imposing deadlines relating to project reviews by automatically approving any permit or license relating to a

major Federal project if the onerous requirements are not met within 1 year. Isn't that correct?

Mr. KOVACS. No. That's not correct. If it's——

Mr. JOHNSON. Well, let me ask Mr. Narang, then. Do you agree that that is correct, Mr. Narang?

Mr. NARANG. That's the way I read the bill.

Mr. JOHNSON. All right. Thank you.

I'll yield back.

Mr. MARINO. Gentleman's time is expired.

The Chair now recognizes the Congressman from Michigan, Congressman Trott.

Mr. TROTT. Thank you, Mr. Chairman.

I want to thank all of the witnesses for their testimony.

Mr. Narang, have you ever run a business before?

Mr. NARANG. I have not, no.

Mr. TROTT. Okay. So let's set up a hypothetical here. Let's say you're a home builder in Detroit and you buy 5 acres of land, and you're going to build 20 homes in Detroit. You spend $500,000 to buy the land, and you borrow that money from the bank and you're paying interest on it. Do you think your business would be more or less successful if it took the City of Detroit 3 years to issue the building permits or 3 weeks?

Mr. NARANG. Well, I would assume that it would be easier for the home developer if, of course, it was issued in 3 weeks. I don't know that I'd agree that that would be a sensible decision given the speed at which it was made.

Mr. TROTT. Well, so if it took 3 years, which it did for many years in Detroit, what—would you be hiring people during that time, or what would you be doing with—a, would you be able to repay that 500,000, or would you be able to stay in business? Would you be hiring people?

Mr. NARANG. Thank you, Congressman. As you know, I am not someone with experience in managing a business. So I don't think that my insight would be very helpful.

Mr. TROTT. Well, it's a real common sense question. You borrow 500,000, you buy five acres of land, you're going to build 20 houses, but for some reason it takes the governmental unit 3 years to issue the permits so you can start building and put the roads in and the sewers. How is your business going to do during those 3 years, and how many jobs are you going to create? That's a common sense answer. Wouldn't you think?

Mr. NARANG. I think these issues are very complicated, and the hypothetical doesn't include potential environmental considerations from that development.

Mr. TROTT. Okay. So in your statement you said that the tradeoff between—there's no evidence to support the argument that there's a tradeoff between economic growth and strong and effective regulatory standards. So do you believe all of the regulations in the code are strong and effective standards?

Mr. NARANG. I didn't say that. No.

Mr. TROTT. So you think some of the regulations should be revisited?

Mr. NARANG. I think many could be strengthened, and they are too weak and ineffective currently. Unfortunately, the SCRUB Act doesn't allow for that.

Mr. TROTT. Could some of them be streamlined?

Mr. NARANG. Could some of the regulations themselves be streamlined?

Mr. TROTT. Right.

Mr. NARANG. It's unclear. I'd have to look at each specific regulation, of course. I do think that the regulatory process for new public health and safety regulations can definitely be streamlined. It just takes one look at our chart for that to be apparent.

Mr. TROTT. So but you seem hesitant to acknowledge that maybe there's some need in the Federal Government to streamline regulations. I mean, you think most of the regulations are pretty efficient as they relate to business?

Mr. NARANG. I assume there could be, but unless I'm given——

Mr. TROTT. Do you think the RAPID Act and the SCRUB Act help us try and streamline some of the regulations that are undermining business?

Mr. NARANG. So I'm a little hesitant to respond, Congressman, only because of the way that you use streamline. You know, a regulation is—sometimes has certain components in order to be effective, and it may not be possible to streamline certain regulations. I would be very comfortable speaking to streamlining processes for adopting regulations.

Mr. TROTT. So when I—at a very high level, when I speak to a small business owner in my district, and in which I spoke to many during the campaign, and they—he has eight employees, it's a oil change business in Canton, Michigan, and he tells me that Federal regulations are crunching his margins and causing him not to be able to open another store, should I say: Well, there's no evidence that Federal regulations are undermining your business or causing you an inability to create jobs, and just tell him to kind of hunker down and get it done? What should I say to that person?

Mr. NARANG. Congressman, you're misconstruing what I was trying to say. So let me actually clarify. Maybe it's my own fault.

I am talking about studies that claim in the aggregate, in a macroeconomic sense, that regulations are harming the economy. Those studies are baseless.

Mr. TROTT. Okay.

Mr. Kovacs, how many jobs, do you think, could be created by the enactment of the RAPID Act?

Mr. KOVACS. Well, I don't think we know how many jobs would be created by this because projects are going on and off the books all the time, but what we did do is in Project No Project we looked at a series of projects that were seeking to get a permit over a 1-year time period, and there were 351 projects that produced electricity, and we picked that because we could get good records on it, and as the Chairman had stated in his initial—in his initial statement, it was roughly about a 1.9 million jobs on 351 projects and about a billion dollars—$600 billion in investment.

Mr. TROTT. Okay. Thank you, sir.

I yield back my time.

Mr. MARINO. Thank you.

The Chair now recognizes the Ranking Member of the full Committee, the gentleman from Michigan, Congressman Conyers.

Mr. CONYERS. Thank you, Chairman Marino.

Let me ask Attorney Narang this question: Is there any empirical evidence not regulation—that regulations depress jobs development? Is there any empirical evidence that regulations depress job development?

Mr. NARANG. Thank you, Congressman. So in the aggregate from a macroeconomic standpoint, there's no empirical evidence—credible empirical evidence to support that claim.

Mr. CONYERS. That's what I've been thinking, but I'd like to explore it a little further. Is there any empirical evidence that regulations adversely impact our Nation's economy?

Mr. NARANG. Again, in the aggregate or macroeconomic sense——

Mr. CONYERS. Yes.

Mr. NARANG. There is none.

Mr. CONYERS. And what is your response to the allegations that regulations impose a $15,000-a-year tax on every American family?

Mr. NARANG. Well, Public Citizen noted almost immediately when the report came out that it was baseless, that it was using a flawed methodology, and that it was the same flawed methodology that other studies, including one that was adopted by the SBA and subsequently disavowed by the SBA also used.

I will say that Public Citizen saying it is one thing, but the Washington Post saying it is definitely another thing, and so I do want to also emphasize that credible, independent, nonpartisan sources have also echoed our criticism of the studies.

Mr. CONYERS. Thank you.

Now, under H.R. 712, the Sunshine for Regulatory Decrees and Settlements, it appears that any private third party could weigh in on a proposed consent decree or settlement agreement pertaining to a regulatory action that affects the rights of private parties.

Hypothetically, under H.R. 712, if the regulatory action involved, for example, the Clean Air Act, could a private third party include someone who breathes air?

Mr. NARANG. So you're right that H.R. 712 massively expands standing to engage in settlement discussions, and I think your question—the answer to your question is I don't necessarily read it as such, but potentially it could.

Mr. CONYERS. Okay. Attorney Narang, what are some of the problems with the proposed regulatory cut-go requirements contained in Title II of the SCRUB Act?

Mr. NARANG. So one thing with—just with respect to the last question, you know, the proposed expansion under H.R. 712 is very different than what you get in the RAPID Act. So I know this is not directly responsive to your question, but the RAPID Act, of course, only allows parties that have commented in the RAPID Act to participate in a judicial challenge of that.

With respect to the SCRUB Act, the cut-go provisions, this is, I would say, a fairly Draconian piece of the bill in that there are very few exceptions to allow agencies to address emergency issues. You know, we saw one last year with the Ebola outbreak. If regulations arenecessary in that instance, I don't see a, you know, any kind of

emergency exception, and then again, what I pointed out in my testimony.

There's a really stark double standard. It doesn't make sense to me to require rules, essentially, to be repealed by agencies within 60 days in order to allow agencies to go forward with rules that would then have to go through the very lengthy process, in most cases, to issue new rules, and would have to go through all of the regulatory impact analyses, cost benefit analyses, public comment participation that is advocated by my fellow witnesses as the hallmarks of a good process, a good regulatory process.

Mr. CONYERS. Thank you very much.

I'm sorry I couldn't get to you other three gentlemen. I have questions for you as well, but I thank the Chairman for the time.

Mr. MARINO. Thank you.

The Chair now recognizes the gentleman from Texas, Mr. Ratcliffe.

Mr. RATCLIFFE. Thank you, Mr. Chairman. I appreciate all the witnesses being here today.

Two weeks ago I spent a week back in my district representing the 18 counties of Northeast Texas, and in traveling that district, one of the things I heard over and over again from constituents as a primary concern was the growing size of our Federal Government. Most of the 700,000 Texans that I have the privilege to represent are angry at the growth of government in this country and the impact that decisions being made by unelected bureaucrats in those agencies are having on their everyday lives.

They see the effect of these decisions in the lunches that their kids eat at school, in the requirements for their dishwashers and for their ice makers and for their air conditioners. They're outraged by a proposed rule from the EPA which would turn the puddles in their back yards into the waters of the U.S., and now last week they saw a government takeover of the Internet through new net neutrality regulations.

Every one of these regulations is an abridgement of some freedom, and it comes with a price tag. In fact, the Competitive Enterprise Institute estimates that the cost of these mandated regulations is $15,000 per household, which is a staggering 23 percent of the average household income in the United States. Twenty-three percent of the income of average Americans shouldn't be held hostage by unelected bureaucrats.

Consistent with some of these excesses that I've mentioned, Mr. Batkins, you noted in your testimony that since 2008 regulators have added more than $107 billion in annual regulatory costs. Did I had hear that correctly?

Mr. BATKINS. Correct.

Mr. RATCLIFFE. All right. And did I also hear you today say that the number of hours spend of Federal regulatory paperwork has expanded to $9.3 billion with a b hours per year?

Mr. BATKINS. As of today, I think it was 9.98 billion.

Mr. RATCLIFFE. Well, I think you'd agree with me that's an outrageous number, whether it's 9.3 or 9.9.

Well, I think that we're like minded on this issue, Mr. Batkins, and I think we're also both encouraged based on your testimony about some of the legislation that we're looking at, and you com-

mented on Congressman Smith's SCRUB Act and the Sunshine for Regulatory Decrees and Settlement Act, that if it was implemented, it would result in savings of billions of dollars in possible benefits, and 1.5 billion hours less of paperwork. Did I hear that correctly?

Mr. BATKINS. Correct.

Mr. RATCLIFFE. So my question to you is this, though: In your opinion, why would the regulatory reform efforts in these bills succeed when so many others have failed to result in real reform on these issues?

Mr. BATKINS. Well, part of the problem is that real reform in the past has been left entirely to the discretion of agencies and with no penalty or judicial review component at all. An agency can violate the Paperwork Reduction Act generally without penalty. They could not submit rules to GAO or Congress under the Congressional Review Act without penalty, and the executive orders are not subject to judicial review either.

It's my understanding that SCRUB—the SCRUB Act does contain that judicial review component, and here we're actually taking away a lot of what is supposedly a burden on regulators currently, which is to review the cumulative stock of regulations. We're taking that off of the agency's plate and putting it in the SCRUB Commission. So I think establishing a separate commission and including those judicial review components is something that will make sure this reform lasts.

Mr. RATCLIFFE. Terrific. Thank you, Mr. Batkins.

Mr. McLaughlin, you noted in your testimony that burdensome regulations are effectively a hidden tax on Americans. That is something that my constituents have heard me say often when talking about regulations in this country.

You went on to say that regulatory reform, if done well, could result in a tax return that benefits most lower-income Americans.

Can you speak to the broader effect that such a—well, I'll call it a tax refund would have on our economy? Specifically on family purchasing power on—and on overall job creation?

Mr. MCLAUGHLIN. Certainly, and thank you for the question.

There have actually been several studies published in peer-reviewed economics journals that have come to a consensus, contrary to my fellow witness' statement that macroeconomic effects of regulation are negative. There was a study in the Journal of the Economic Growth, and in several studies put out by the World Bank were published in some top journals as well, and the consensus result of these studies is that we slow economic growth, and the primary mechanism that forces that to happen is through the hindrance of innovation.

So if you think about your constituents and a small business man, perhaps, there, if he has a set of choices with which to make his business work and as the—as regulations build up those choices are more and more constricted, more and more constrained, then by definition he will be less able to innovate. That's the primary mechanism, and whenever innovation is hampered, you're going to see negative effects on job growth.

In fact, there was a recent survey done of Silicon Valley CEOs, one of the great engines of our economy, and it asked them what

they think the biggest problem is for their business is, and they said number one is regulation.

Mr. RATCLIFFE. Thank you.

My time has expired.

Mr. MARINO. Thank you.

I'm going to ask that Mr. Conyers make a statement at this point.

Mr. CONYERS. Well, thank you very much, Chairman Marino.

Mr. MARINO. Or introduce someone, I think.

Mr. CONYERS. I really wanted to give a welcome and a shout out to Attorney Scott Peters, who in a second term, has joined the House Judiciary Committee, and we're very proud of him. He's from California, I think the San Diego area, and we all look forward to working with you, and welcome aboard.

Mr. PETERS. Thank you very much.

Mr. CONYERS. Thank you.

Mr. MARINO. You are welcome.

Now the Chair recognizes the newest Member, Mr. Peters from California, who is under no pressure to perform now since he got those glowing remarks from Mr. Conyers.

Mr. PETERS. Thank you, Mr. Chairman, and thank you, Mr. Conyers, for the very kind comments.

When I practiced law, I represented a lot of large and small businesses and government agencies trying to get through the permit process, and I'm actually very sympathetic to the notion that we should set high stands and we should respond in a timely way because in a microeconomic sense you talk to these businesses that are really affected by the carrying costs of regulation, and actually I was one of the Democrats that actually voted for this RAPID Act last time, but I have an issue with it this time which is the subsection K prohibition of any consideration of the social cost of carbon, which is the economic, environmental, and social costs of carbon dioxide emissions by agencies in an environmental review or decision making, and it applies to all Federal agencies by the terms of this bill.

Accounting for the social costs of carbon and preparing for climate change, according to Mayor Bloomberg's Report, which is a bipartisan report, it is a smart business practice, with greenhouse gas driven changes in temperature will necessitate the construction of new power generation capacity that the report estimates will cost residential and commercial rate payers up to $12 billion per year, and in 2014 the Pentagon also issued a report on the security risks of climate change, finding that climate change poses an immediate threat to national security due to increased risks of terrorism, food shortage, poverty, and infectious diseases.

So I guess I'd ask Mr. Kovacs, Mr. Batkins, and Mr.—Dr. McLaughlin, if any of you sees this ban on considering the social costs of carbon as necessary to achieving the regulatory reform of this act, and if you do see it as important, where would we evaluate as a Nation the costs of carbon issues that the business community and the Pentagon have raised?

Mr. KOVACS. Sure. Well, first of all, I'm honored to get your first question. So I thank you very much.

The issue with social—first of all, I don't know how it even got in the bill. I think was an amendment so——

Mr. PETERS. It was an amendment. Right.

Mr. KOVACS. Because it wasn't in the original bill.

I think that the issue, and I'm just talking about from the outside, that it's been used roughly by 62 times, and I don't think anyone has a problem with that, but it's never gone through either the Data Quality Act peer review or any type of the public comment, and I think that if you could work out a way in which to send it through public comment so people know what the assumptions are that they're using and how it's being factored in, that the way it is now is it could be set at $5 or it could be set at 50 or 100.

Mr. PETERS. Would—Mr. Kovacs, wouldn't the NEPA process by its process be a process in which we could evaluate that and——

Mr. KOVACS. No. Because it's more of a—I think it's more of an economic issue, and there may be ways in which the agency that uses it could do it. I think it's easy, and we'd be—I mean, that's one we would——

Mr. PETERS. But it doesn't have to be in this bill, does it, to achieve the regulatory reform?

Mr. KOVACS. I didn't even—really, until today I didn't even know it was in the bill.

Mr. PETERS. Okay. Good. Either of you think it's important to this bill to achieve regulatory reform?

Mr. BATKINS. The RAPID Act wasn't something I specifically address in my testimony. From just my initial—I know that social cost of carbon has been a part of Federal rule making, I think, since 2009, 2010, varying every year and depending a lot on discount rate, but I haven't evaluated its——

Mr. PETERS. Okay.

Mr. BATKINS [continuing]. Impact on RAPID.

Mr. PETERS. Dr. McLaughlin?

Mr. MCLAUGHLIN. I'm afraid I don't really have an opinion on this.

Mr. PETERS. Okay. So I would just make the comment, I—Mr. Trot's example, he's left now, but it's an example that I've given for my clients many times. You know, you have—you make an investment, you have to carry the cost of the—of the debt on that investment if you borrowed money for a period of time, and you can't get a return until you can get your permits, and so I'm very sympathetic to working on this, but it does strike me that this ban on the considering the social costs of carbon, even as part of a quicker reduced tighter regulatory process is gratuitous, it's unnecessary, and I'm going to ask my—at appropriate time I'll ask my colleagues to amend the bill to remove that prohibition. It will certainly make it much more attractive to me to vote for it, and I think to a lot of my colleagues on this side of the aisle.

Mr. Chairman, thank you very much. I yield back.

Mr. MARINO. Thank you.

I'm now going to recognize myself for 5 minutes of questioning, and first of all I would like to enter into the record an article dated Tuesday, January 18, 2011, in the Wall Street Journal states that "President Obama announced that he will be signing an executive order to review regulations with an eye toward getting rid of

unneeded regulations and making existing regulations less intrusive and more flexible," and he goes on to say that the costs will be a factor that's considered in this as well as environmental issues and seeing that we can get regulation in permits submitted much sooner than we're doing at this point.

[The information referred to follows:]

THE WALL STREET JOURNAL.

http://www.wsj.com/articles/SB10001424052748703396604576086272112103698

OPINION

Toward a 21st-Century Regulatory System

If the FDA deems saccharin safe enough for coffee, then the EPA should not treat it as hazardous waste.

By **BARACK OBAMA**

Updated Jan. 18, 2011 12:01 a.m. ET

For two centuries, America's free market has not only been the source of dazzling ideas and path-breaking products, it has also been the greatest force for prosperity the world has ever known. That vibrant entrepreneurialism is the key to our continued global leadership and the success of our people.

But throughout our history, one of the reasons the free market has worked is that we have sought the proper balance. We have preserved freedom of commerce while applying those rules and regulations necessary to protect the public against threats to our health and safety and to safeguard people and businesses from abuse.

From child labor laws to the Clean Air Act to our most recent strictures against hidden fees and penalties by credit card companies, we have, from time to time, embraced common sense rules of the road that strengthen our country without unduly interfering with the pursuit of progress and the growth of our economy.

Sometimes, those rules have gotten out of balance, placing unreasonable burdens on business—burdens that have stifled innovation and have had a chilling effect on growth and jobs. At other times, we have failed to meet our basic responsibility to protect the public interest, leading to disastrous consequences. Such was the case in the run-up to the financial crisis from which we are still recovering. There, a lack of proper oversight and transparency nearly led to the collapse of the financial markets and a full-scale Depression.

Over the past two years, the goal of my administration has been to strike the right balance. And today, I am signing an executive order that makes clear that this is the operating principle of our government.

This order requires that federal agencies ensure that regulations protect our safety, health and environment while promoting economic growth. And it orders a government-wide review of the rules already on the books to remove outdated regulations that stifle job creation and make our economy less competitive. It's a review that will help bring order to regulations that have become a patchwork of overlapping rules, the result of tinkering by administrations and legislators of both parties and the influence of special interests in Washington over decades.

Where necessary, we won't shy away from addressing obvious gaps: new safety rules for infant formula; procedures to stop preventable infections in hospitals; efforts to target chronic violators of workplace safety laws. But we are also making it our mission to root out regulations that conflict, that are not worth the cost, or that are just plain dumb.

For instance, the FDA has long considered saccharin, the artificial sweetener, safe for people to consume. Yet for years, the EPA made companies treat saccharin like other dangerous chemicals. Well, if it goes in your coffee, it is not hazardous waste. The EPA wisely eliminated this rule last month.

But creating a 21st-century regulatory system is about more than which rules to add and which rules to subtract. As the executive order I am signing makes clear, we are seeking more affordable, less intrusive means to achieve the same ends—giving careful consideration to benefits and costs. This means writing rules with more input from experts, businesses and ordinary citizens. It means using disclosure as a tool to inform consumers of their choices, rather than restricting those choices. And it means making sure the government does more of its work online, just like companies are doing.

We're also getting rid of absurd and unnecessary paperwork requirements that waste time and money. We're looking at the system as a whole to make sure we avoid excessive, inconsistent and redundant regulation. And finally, today I am directing federal agencies to do more to account for—and reduce—the burdens regulations may place on small businesses. Small firms drive growth and create most new jobs in this country. We need to make sure nothing stands in their way.

One important example of this overall approach is the fuel-economy standards for cars and trucks. When I took office, the country faced years of litigation and confusion because of conflicting rules set by Congress, federal regulators and states.

CORBIS

The EPA and the Department of Transportation worked with auto makers, labor unions, states like California, and environmental advocates this past spring to turn a tangle of rules into one aggressive new standard. It was a victory for car companies that wanted regulatory certainty; for consumers who will pay less at the pump; for our security, as we save 1.8 billion barrels of oil; and for the environment as we reduce pollution. Another example: Tomorrow the FDA will lay out a new effort to improve the process for approving medical devices, to keep patients safer while getting innovative and life-saving products to market faster.

Despite a lot of heated rhetoric, our efforts over the past two years to modernize our regulations have led to smarter—and in some cases tougher—rules to protect our health, safety and environment. Yet according to current estimates of their economic impact, the benefits of these regulations exceed their costs by billions of dollars.

This is the lesson of our history: Our economy is not a zero-sum game. Regulations do have costs; often, as a country, we have to make tough decisions about whether those costs are necessary. But what is clear is that we can strike the right balance. We can make our economy stronger and more competitive, while meeting our fundamental responsibilities to one another.

Mr. Obama is president of the United States.

Mr. MARINO. So with that, Mr. Kovacs, if there are true environmental problems with a project, with a given project, will the RAPID Act prevent Federal officials from assuring that those problems are dealt with before a permit is granted?

Mr. KOVACS. Yes. I mean, all of the—all of the problems, all of environmental commitments and all of the permit requirements have to be complied with. There is—there is no substantive change anywhere in Federal law. This is purely—and I keep on saying this—this is purely a management bill where you have a lead agency coordination with the states, and you have some timeframes, and that's all this bill does.

And if you look at what CEQ is doing, the President's executive orders, what they've done in the Senate on safety, the Republicans and the Democrats have been on the same side of the page on this type of an issue for a while.

Mr. MARINO. Some have suggested, again, Mr. Kovacs, that the RAPID Act would gut NEPA. Would it or would it not?

Mr. KOVACS. No. It doesn't do anything to the substance.

Mr. MARINO. Okay. Dr. McLaughlin, Mr. Narang made an assertion that arguments linking regulations to job losses and depress economic growth are pure fiction. Would you like to respond to that?

Mr. MCLAUGHLIN. Certainly. There was a article in the highly respected journal, the Journal of the Economic Growth, a peer-reviewed economics journal by Professors John Dawson and John Cedars that found the accumulation of regulation hinders economic growth by about 2 percent per year. There have been other studies that have found similarly large hindrances of economic growth from regulatory accumulation published in such respected journals as the Quarterly Journal of Economics, it's one of the top journals that there is in economics, as well as in economics letters from such esteemed bodies as the World Bank.

So I think it's patently false to say that there is no evidence that the accumulation of regulation harms economic growth.

Mr. MARINO. Again, Mr. McLaughlin, the SCRUB Act also authorizes the Retrospective Regulatory Reform Commission to recommend to Congress whether statutory authority to promulgate regulation should be repealed.

Why is that feature of the bill important?

Mr. MCLAUGHLIN. I'm sorry. Could you repeat that. I couldn't quite catch it.

Mr. MARINO. Yeah. The SCRUB Act also authorizes the Retrospective Regulatory Review Commission to recommend to Congress whether statutory authority to promulgate regulations should be repealed.

Why is that feature of the bill important?

Mr. MCLAUGHLIN. Thank you. That's actually quite important because the source of a problem—regulations come from statutes. The Congress requires regulators to make rules. But if Congress required that in such a way that the regulator is limited in his choices, in other words, that the regulator has to make a rule that's not effective, for example, then we need to point back to the source of the problem itself.

Mr. MARINO. Okay. Mr. Narang, again, is that correct?

Am I pronouncing your name correct? I apologize. I've been trying to get this straight for a couple minutes.

Mr. NARANG. Thank you. There's a far more direct way also for Congress to do that same act—take that same action, which would be to directly repeal statutes. So, for example, if Congress wants to directly repeal the Clean Air Act, it can do so in a very direct way. We don't need a commission—a taxpayer-expensed commission to make those recommendations.

Mr. MARINO. But do you agree with me that the RAPID Act does not tell any agency how to go through the permitting process and how to do their evaluations?

Mr. NARANG. I think also taking into consideration what Congressman Peters just pointed out, that the social costs of carbon is not to be incorporated into these environmental impact statements, it puts a very heavy thumb on the scale in favor of projects that would emit large amounts of carbon in the atmosphere and contribute to climate change.

Mr. MARINO. But do you know the argument and the climate change issue has been going on for years and years, and it's apparent that each side can bring in all kinds of witnesses to counter the other side, but don't you think that 15 years is way too long for the Federal Government and other governments to determine whether a permit should be issued?

Mr. NARANG. I would agree with that, and I'd also say that 15 years is far too long for—in critical public health and safety measures. Unfortunately, at Public Citizen we have a quite a few examples of public health and safety measures that took longer than 15 years to protect the public.

Mr. MARINO. And I see that, you know, my time has expired.

And I want to thank everybody for being here today. I know we're going to vote. I don't think it's going to be in the next couple of minutes, but it's closely coming.

This concludes today's hearing, and thanks to all of our witnesses for attending, and without objection, all Members will have 5 legislative days to submit additional written questions for the witnesses or additional materials for the record.

And the hearing is adjourned, and thank you.

[Whereupon, at 5:29 p.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

MISSOURI FARM BUREAU FEDERATION
P.O. Box 658, 701 South Country Club Drive, Jefferson City, MO 65102 / (573) 893-1400

March 2, 2015

The Honorable Bob Goodlatte
Chairman
Committee on the Judiciary
2138 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Goodlatte:

On behalf of Missouri Farm Bureau, the state's largest agriculture organization, I am pleased to support H .R. 1155, the *Searching For and Cutting Regulations That Are Unnecessarily Burdensome Act of 2015* (SCRUB Act). For some time, our members have been concerned about the federal regulatory climate; those concerns have only deepened in recent years. It is imperative the 114th Congress passes H.R. 1155 and other bills to provide meaningful regulatory reform.

As I travel the state visiting with farmers and ranchers, rules proposed by federal agencies—particularly the Environmental Protection Agency—are the topics most frequently mentioned, along with the impacts of regulations already in effect. While our top federal priorities include opposing expansion of federal jurisdiction under the Clean Water Act and reforming the Endangered Species Act to balance the needs of species with the needs of people, we hope to also make progress in other areas.

Generally speaking, our organization expends a great deal of effort during the formal rulemaking process to make agency officials aware of farmers' and ranchers' views and explain the economic impacts because, as we have learned through the years, it is very difficult to make substantive changes once a regulation is final. We support your proposal because it would establish a bipartisan commission charged with reviewing existing federal regulations and identifying those that are unnecessary and should be repealed.

Reforming the rulemaking process is critically important, as is providing rigorous oversight of regulations already in place. We appreciate your leadership on this issue.

Sincerely,

Blake Hurst
President

Questions for the Record from Representative Doug Collins for the Hearing on H.R. 348, the "Responsibly and Professionally Invigorating Development Act of 2015," H.R. 712, the "Sunshine for Regulatory Decrees and Settlements Act of 2015," and H.R. 1155, the "Searching for and Cutting Regulations that are Unnecessarily Burdensome Act of 2015."

March 2, 2015

Questions for William Kovacs

1. *Could you describe and provide a brief example of how Sue and Settle agreements can go beyond enforcing statutory deadlines and instead become the de facto legal authority for expensive regulatory actions? Could you provide a brief example?*

Yes. Although advocacy groups most commonly engage in sue and settle agreements to enforce statutory deadlines for agency actions they consider priorities—thereby altering an agency's existing resource priorities—some agreements involve agency actions wholly unrelated to statutory deadlines. For example, in response to a complaint filed in January 2009 by advocacy groups, EPA agreed in May 2010 to establish stringent new water standards to accelerate the ongoing state-led program to clean up Chesapeake Bay. EPA relied on an unprecedented regulatory tool, "federal backstopping" to force state and local authorities to implement the accelerated federal plan. This is precisely the action that advocacy groups had demanded of EPA. EPA was not required to establish a federal plan for Chesapeake Bay, and federal backstopping is not a requirement of the Clean Water Act. In the end, EPA has relied on the consent decree itself—signed by a federal judge and under the court's continuing jurisdiction—as the legal basis for the federal Chesapeake cleanup plan.

Similarly, in 2006 EPA was sued over a final rule on protecting human subjects in research involving pesticides. Advocacy groups claimed that the rule didn't go far enough. In November 2010, EPA and the advocacy groups finalized a settlement agreement requiring EPA to include ***specific*** regulatory text in a new proposed rule. The advocacy group's influence over the actual substance of the rule is reflected by the fact that EPA incorporated the specific regulatory text into the proposed and final rules. EPA was not mandated by statute to take any action on the human testing rule and was not required by any statute to accept ***verbatim*** regulatory language sought by the advocacy groups in closed-door settlement negotiations.

Further, in May 2009, an advocacy group sued EPA challenging the agency's approval of Washington State's 2008 list of impaired waters under the Clean Water Act. The group contended that the state had failed to include coastal waters impaired by lower pH because of rising CO2 levels. To settle the case, EPA agreed to take public comment on issuing guidance on the issue of whether coastal waters should be listed as "impaired" because of CO2-related acidification.[1] EPA had not interpreted the Clean Water Act to require such a listing. Subsequently, on November 10, 2010, EPA issued guidance to the states and EPA Regions instructing them to list coastal waters as "impaired" where there is data to indicate a change in the pH of coastal waters

[1] 75 Fed. Reg. 13,537 (March 22, 2010).

Finally, advocacy groups frequently challenge EPA's approval of state renewals of Clean Air Act Title V operating permit to coal-fired utilities, arguing that the permit in question should be conditioned on CO2 reduction requirements. EPA often agrees through settlements to consider such conditions on a specified timetable.

2. *What recourse if any is available for third parties to challenge Sue-and-Settle agreements under current law? How can third parties challenge an agency's surrender of its discretionary power?*

At present, it is virtually impossible for third parties to challenge sue-and -settle agreements. First, it is almost impossible to get a seat at the negotiating table. Even in cases where there are multiple litigants, courts often allow advocacy groups to negotiate directly with EPA or other relevant agencies, leading to settlement agreements that exclude all interests except those of the advocacy group and the agency. In the case of the Mercury Air Toxics (MATS) rule (another stringent federal rule that was not specifically required by the Clean Air Act), an affected industry group was able to intervene in the settlement negotiation, only to be shut out of the settlement process and not even be notified that EPA and the advocacy group had drafted a proposed consent decree. The federal judge signed the consent decree despite concerns that the industry intervenor had been wholly excluded from the process.

Second, many sue and settle agreements are not made available to the public until after they have become legally effective. There is no way to challenge the terms of a sue-and-settle agreement after it has been signed by a judge. At present, only settlements involving the Clean Air Act are required to be put out for public notice and comment in the *Federal Register* under section 113(g) of the Act.

Third, submitting adverse public comments on a proposed settlement or consent decree virtually never results in modifications to the settlement or decree. While EPA acknowledges that it frequently receives adverse comments pursuant to its Clean Air Act section 113(g) notices of proposed consent decrees, the agency can only point to **one** such proposed consent decree that was modified because of adverse comments.[2]

At present, therefore, there is no effective, reliable mechanism for third parties to have any real influence over an agency's decision to enter into a sue-and-settle agreement, even if the agency effectively surrenders its discretionary power through such an agreement.

3. *Could you speak to the effects that regulations resulting from consent decrees and settlements can have on current workers and senior workers? For example, how long does it take for displaced workers or workers who are senior in their positions, trades or*

[2] During her Senate confirmation, EPA Administrator Gina McCarthy stated that the deadline EPA and an advocacy group had agreed upon for the Brick Maximum Achievable Control Technology (MACT) rule was adjusted because of adverse comments from the Brick Industry Association. *See* 77 Fed. Reg. 73029 (December 7, 2012); 78 Fed. Reg. 2,260 (January 10, 2013).

professions to be retrained for new jobs with comparable pay? Are displaced workers and senior workers typically able to find new jobs relatively quickly, in the same geographic area and at comparable pay? What kinds of jobs are typically harmed by the regulations resulting from the types of agreements mentioned above?

Notwithstanding the congressional mandate for EPA to conduct "continuing evaluations of potential loss or shifts in employment which may result from the administration or enforcement of [environmental statutes];"[3] EPA has not considered employment or job displacement impacts when performing regulatory impact analyses. Thus, the available evidence of job displacement impacts comes primarily from two sources: 1) retrospective reviews of the impacts of regulations that use statistical analysis of employment in the regulated industry before and after regulation, and 2) impact analyses that use sophisticated economic models to project what impact the costs imposed by a regulation will have on employment.

Retrospective reviews of regulatory impacts on jobs find consistently that jobs in the regulated industry, and in industries related through the supply chain, suffer job displacement from costly regulations. For instance, a 2012 study by Greenstone, List, and Syverson found that Clean Air Act regulations decreased productivity leading to job losses in affected industries.[4] A 2010 paper by Hanna found that U.S. firms shifted production to foreign markets as a result of the 1990 Amendments to the Clean Air Act, leading to job losses among American workers.[5]

Economic modeling can also inform policymakers about job losses from regulation before a new rule goes into effect. In 2013 the Chamber commissioned a study by NERA Economic Consulting that examined EPA's use of job impact estimates in response to E.O. 13,563's requirement to do so.[6] The study found that EPA infrequently conducted job impact analyses, and that when they did, they used inappropriate methods that vastly underestimated job losses, and in some cases even allowed them to estimate that proposed regulations would have a positive net jobs impact. The NERA study that while EPA claimed that its 2012 Mercury and Air Toxics Standard (MATS) would create 46,000 temporary construction jobs and 8,000 permanent jobs as a result of imposing nearly ten billion dollars of new annual costs on the electricity generation sector, using appropriate whole economy modeling the rule would actually cause the equivalent of 50,000 to 85,000 lost jobs annually.

As a result of the NERA findings, the Chamber has urged the EPA to adopt whole economy, or economy-wide, modeling of the economic impacts of its regulations rather than the piecemeal and incomplete approach the agency has traditionally used. The EPA recently convened a Science Advisory Board panel to explore the subject of using such models in its

[3] *See, e.g.*, 42 U.S.C. § 7621(a).
[4] Michael Greenstone, John A. List, and Chad Syverson. 2012. The effects of environmental regulation on the competitiveness of U.S. manufacturing. NBER Working Paper 18392. MIT Department of Economics Working Paper No. 12-24.
[5] R. Hanna. 2010. US environmental regulation and FDI: evidence from a panel of US-based multinational firms. *American Economic Journal: Applied Economics*, 2(3): 158-189.
[6] NERA Economic Consulting 2013. "Estimating Employment Impacts of Regulations: A Review of EPA's Methods for Its Air Rules."

rulemaking.[7] The Chamber believes that whole economy modeling should be used for all EPA rulemakings for which compliance costs exceed one billion dollars annually.

For example, how long does it take for displaced workers or workers who are senior in their positions, trades, or professions to be retrained for new jobs with comparable pay? Are displaced workers and senior workers typically able to find new jobs relatively quickly, in the same geographic area and at comparable pay?

While the length of time it takes displaced workers, especially senior level workers, to find new employment after regulation pushes them out of their old job is almost wholly dependent upon the health of the local economy in which they are located, it is a near certainty that they will *never* find employment at comparable pay again. Labor markets across the U.S. vary greatly by region, by whether they are rural or urban, and by the local industrial mix, and the nationwide impact of business cycle fluctuations also play a significant role. Therefore, it is always hard to pin down how long any displaced worker will remain unemployed. Research by Walker has shown that workers in newly regulated industries have faced significant lost earnings, largely as a result of persistent unemployment and subsequent underemployment for workers displaced as a result of regulation.[8] Other research by Walker found that a non-attainment designation (for ozone NAAQS) for an area resulted in the local labor force having the present discounted value of lifetime earnings reduced by 20%.[9] Job displacement caused by regulation is a serious, long-term problem that follows the affected workers for the rest of their working lives.

What kinds of jobs are typically harmed by the regulations resulting from the types of agreements mentioned above?

Job losses from regulation are most obvious in the industries directly impacted by new regulatory requirements, or by industries closely connected in the supply chain. When businesses are required to borrow and spend money for regulatory compliance, they often have less ability to invest elsewhere, such as on research and development or equipment. For example, while the MATS rule discussed above will not be fully implemented for another year, the rule is already having major employment impacts on the coal industry.[10] However, it will also have impacts on additional, related industries, such as railroads (the primary method of shipping coal) and industries that use a lot of electricity, such as manufacturing. In fact, in the research for the Chamber cited previously NERA estimated that a number of EPA Clean Air Act rules would have significant negative employment impacts on manufacturing.

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[7] http://yosemite.epa.gov/sab/sabpeople.nsf/WebCommitteesSubcommittees/Economy-wide%20Modeling%20Panel.

[8] Reed Walker. 2012. The Transitional Costs of Sectoral Reallocation: Evidence from the Clean Air Act and the Workforce. US Census Bureau Center for Economic Studies Paper No. CES-WP- 12-02.

[9] W. R. Walker. The transitional costs of sectoral reallocation: evidence from the Clean Air Act and the workforce, *The Quarterly Journal of Economics*, 1787-1835

[10] *See Washington Post*, "Study: Coal Industry Lost Nearly 50,000 Jobs in Just Five Years" (April 1, 2015) (attributing dramatic reduction in coal industry jobs to multiple factors, including "increased regulatory initiatives by the Obama administration" and noting that workers in affected coal regions do not typically get newly-created jobs in natural gas and renewable energy industries).

A 2010 study by the Swedish Agency for Growth Policy Analysis evaluated regulatory burdens across nations and the effects of regulations on economic growth and vitality. The study found that higher regulatory burdens (1) raise the costs of business operations, (2) make capital financing more expensive and harder to obtain, and (3) act as a barrier to entry for new firms, resulting in less competition and less ability to innovate and adapt to new economic conditions or new technologies. Countries having a heavier regulatory environment were found to be less entrepreneurial and to experience significantly slower growth of per capita income. In sum, excessive regulation results in a stagnant, ossified economy and an overall standard of living that is lower than that found in countries with similar resources but less burdensome regulations.[11]

Regulators too optimistically assume that workers who are displaced from long-held jobs by regulations will quickly find new, comparable work. In reality, many workers never return to full-time work, and those who do often earn below their previous wage levels long after re-employment. The Bureau of Labor Statistics' Displaced Worker Survey in January 2012 found that among the 6.1 million workers who lost long-tenured jobs between 2009 and 2011, 44% were still unemployed up to three years later.

Workers age 60 or older are the most likely to be unemployed or not in labor force,[12] and more than half of those without jobs drop completely out of the labor force, and simply give up looking for work (*see* Figure 2). For workers age 65 and older the proportion remaining jobless is 75%. Further, BLS data shows that even for workers in their 20s, more than 30 percent remain jobless up to **three years** after losing a job that they had held for a significant time.

Similarly, regulators usually assume that workers who lose jobs because of their regulatory decisions will find new jobs that pay as well as lost jobs. The reality is that even when displaced workers find new jobs, those jobs pay less than their lost jobs. The earnings loss is greater for older displaced workers, and the earnings loss is not just temporary. Studies of payroll records show that the negative impacts last for decades. Twenty years after losing a long-tenured job, workers earn 15% to 20% less than comparable workers who experienced no job loss (*see* Figure 3).[13]

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[11] Swedish Agency for Growth Policy Analysis, "The Economic Effects of the Regulatory Burden." Report 2010:14. www.growthanalysis.se.

[12] U.S. Chamber analysis of micro-data (independent respondent records) files of the Displaced Worker Survey supplement to the Current Population Survey published by the Bureau of Labor Statistics/Census Bureau at http://thedataweb.rm/TheDataWeb/launchDFA.html.

[13] *Id.*

Figure 2

Many Displaced Workers Stay Jobless

Full time workers who were displaced 2009-2012 unemployed or not in labor force, January 2012

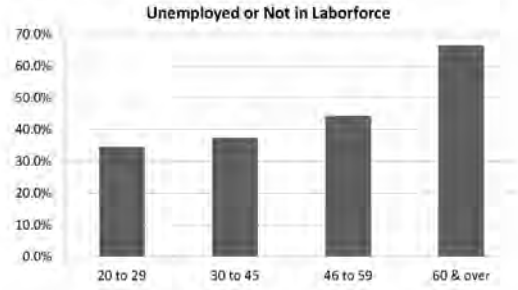
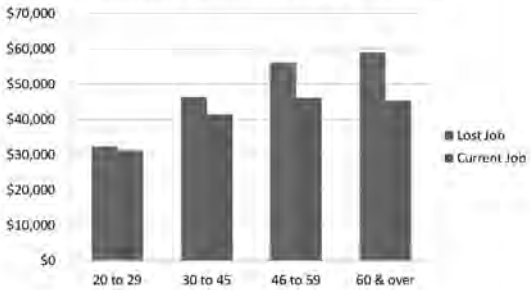


Figure 3

Post-Displacement Jobs Pay Less

Annual earnings before and after job loss, January 2012. Full time workers who were displaced 2009-2012



Over the past 40 years, many American industries have declined or disappeared that were once the economic bulwarks of communities and the nation. While a variety of factors have played a part in each of these changes in the industry structure of the economy, a common thread running through all of them has been the role of regulatory mandates and costs. Even when regulations are not the primary cause of change, regulations can provide the tipping point that leads to plant closures and adverse economic impacts that otherwise might have been avoided or cushioned over time.

The workers who lose their jobs today because regulation forces the plants where they have invested their working lives to shut down typically do not have the skills needed to take the new jobs that EPA promises will materialize, and typically new jobs when they materialize are in different places than the jobs destroyed. For example, the basic idea that a job lost today at a power plant in Ohio that shuts down will be replaced within a year or two by a new job at an electric vehicle plant in California is little comfort for workers who need to feed their families and to make their mortgage payments in Ohio today.

Consider the potential economic losses faced by just the 2,000 Appalachian coal miners who lost their jobs in May and June 2012. Based on average experience reported in the most recent BLS survey of displaced workers, 860 of those 2,000 workers can expect to still be jobless (either looking for work or given up looking) three years from now. Based on the average hourly pay of production workers in the coal mining industry,[14] those 860 workers and their families can expect each to lose over $151,000 in income from three years of joblessness. That amounts to a total economic loss of $126 million for those 860 families over three years and more losses as more years of joblessness accumulate.

What of the other workers, the ones who are lucky enough to find new jobs within three years? Based on the averages from current average duration of unemployment published by BLS, even they will face 39 weeks of unemployment and an income loss of $38,313 each during their job search (totaling $36.7 million for those 1,140 workers and their families.) The displaced worker survey data also suggests that 615 of them will have to take a significant cut in pay when they do find new work, adding further to the burden that they carry from their job displacement.

The table below shows the employment decline in a few of the industries significantly affected by EPA rulemaking since 1990.[15] Furniture, steel, sawmills/wood preserving and underground coal mining have been particularly hard-hit, each losing over 40 percent of the jobs that existed in 1990. The six industries shown accounted for over one million jobs in 1990 and by 2011, job losses totaled 472,300.

Table A **Employment Losses Selected Industries 1990 to 2011**		
	Employment (thousands)	**Percent Change**
Bituminous coal and lignite surface mining	**17.1**	**30.6%**

[14] According to Bureau of Labor Statistics Occupational Employment and Earnings Survey data for May 2011, average hourly pay was $24.31 per hour. Weekly and annual earnings do are based on 40 hours per week and do not include overtime pay that many miners receive.

[15] The change in employment by industry was calculated by a U.S. Chamber analysis of annual average employment by industry data published by BLS for 1990 and for 2011. In each case, the published 2011 average annual employment level was subtracted from the 1990 level to obtain the differences indicated in the chart (in each case the difference is a loss, because 2011 total employment for each industry was less than the 1990 level. The percentage change was calculated as the job loss total divided by the 1990 employment level.

Bituminous coal underground mining and anthracite mining	**32.8**	**40.8%**
Sawmills and wood preservation	**64.0**	**43.2%**
Lime, gypsum, and other nonmetallic mineral products	**16.3**	**16.7%**
Iron and steel mills and ferroalloy production	**93.2**	**49.9%**
Furniture and related products	**248.9**	**41.4%**
Total	**472.3**	**40.4%**
Source: Bureau of Labor Statistics, Current Employment Statistics series		

Even if job growth was spurred in other industries, the reality is that 472,000 workers and their families were burdened with the economic costs of job loss and the necessity to search for and retrain for replacement jobs. In many cases they have faced many months of unemployment before finding new jobs. In today's economy, according to Bureau of Labor Statistics data, the average job seeker has been looking for work for 39 weeks – over nine months.

This is not an exhaustive list. It is merely a list of a few selected industries that have been affected by EPA regulations. While these job losses were not necessarily solely the result of environmental regulations, even in cases where industries were also declining for other reasons, it is reasonable to argue that regulatory burdens made matters worse. The important point is that EPA has not done the work that Congress repeatedly called for it to do with respect to investigating and tracking industries impacted by its regulations (past and proposed) to determine the extent to which worker displacement is the result of environmental regulations and to consider what steps could be taken by the government to ameliorate the burdens of job displacement that government policy decisions impose on working families.

Recent studies highlight the startling human dimension of unemployment. For example, one study of mid-career workers who lose long-held jobs found:[16]

> A worker displaced in mid-career can expect to live about one and half years less than a non-displaced counterpart. The reduction in life expectancy is smaller for older workers who experience lower lifetime earnings losses and are exposed to increased mortality for a shorter period of time. Our results do not speak to the role of non-economic factors such as stress, self-worth, and happiness.[17]

[16] Daniel Sullivan and Till von Wachter, "Job Displacement and Mortality: An Analysis Using Administrative Data: Quarterly Journal of Economics, Vol. 124 (2009), number 3 (Aug), pp. 1265-1306 at http://qje.oxfordjournals.org/content/124/3/1265.short.

[17] Sullivan and von Wachter at 1290.

Moreover, the rate of suicides for unemployed workers also increased by up to ten percent.[18] These are real people, and not EPA's computer modeled people.

EPA needs to consider more than the supposed net impacts of a new regulation, viewed in isolation. While EPA's regulations have both benefits and costs, the reality is that the winners and the losers are usually not the same people and usually do not even live in the same communities. EPA's regulatory decisions create massive shifts in the structure of the economy, benefiting some workers, some communities and some industries and imposing costs or devastation on others. Even if EPA's redistributive mandates yield a net benefit for society as a whole over time, the rapidity of change that EPA mandates and the nationwide scope of change is a tremendous shock to the economic system. EPA needs to consider how it can lessen the burdens it is placing on the workers, families and communities that it targets for losses.

EPA could reduce the economic shocks of its rules by adopting more gradual approaches that phase in new standards over longer periods of time and that apply new standards only to new facilities, thereby cushioning the impacts on existing facilities and the communities they are located in. New technologies yield net benefits to society, but efficiency gains come with costs as jobs and industries dependent on older technologies are replaced. But in the case of technological change, the typical experience is gradual adjustment that cushions the shocks of economic change. EPA should endeavor to make its program of environmental change resemble more closely the successful experience of adoption of technological change. In addition to gradual schedules for adoption of new standards, EPA might also feature greater reliance on voluntary compliance, demonstrations, and incentive programs. A more gradual approach to regulation implementation would yield the added benefit of facilitating empirical study of effects to ensure that policies really are effective and on the right track.

[18] *Id.* at note 49. *See also* Annie Lowery, "Death and Joblessness," Washington Independent, August 17, 2010 at http://washingtonindependent.com/94925/death-and-joblessness.

ONE HUNDRED FOURTEENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY

2138 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515–6216

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http://www.house.gov/judiciary

March 17, 2015

Mr. Amit Narang
Regulatory Policy Advocate
Public Citizen
215 Pennsylvania Avenue Southeast #3
Washington, DC 20003

Dear Mr. Narang,

The Committee on the Judiciary's Subcommittee on Regulatory Reform, Commercial and Antitrust Law held a hearing on H.R. 348, the "Responsibly And Professionally Invigorating Development Act of 2015" (RAPID Act); H.R. 712, the "Sunshine for Regulatory Decrees and Settlements Act of 2015"; and, H.R. 1155, the "Searching for and Cutting Regulations that are Unnecessarily Burdensome Act of 2015" (SCRUB Act), on Monday, March 2, 2015 in room 2141 of the Rayburn House Office Building. Thank you for your testimony.

Questions for the record have been submitted to the Subcommittee within five legislative days of the hearing. The questions addressed to you are attached. We will appreciate a full and complete response as they will be included in the official hearing record.

Please submit your written answers by Tuesday, April 28, 2015 to Andrea Lindsey at Andrea.Lindsey@mail.house.gov or 6240 O'Neill Federal Office Building, Washington, DC, 20024. If you have any further questions or concerns, please contact or at 202-226-7680.

Thank you again for your participation in the hearing.

Sincerely,

Bob Goodlatte

Bob Goodlatte
Chairman

Enclosure

Questions submitted for the Record from Representative John Conyers, Jr. and Representative Henry C. "Hank" Johnson, Jr.

Sunshine for Regulatory Decrees and Settlements Act

1. In his testimony before the Subcommittee in June 2013 in opposition to H.R. 1493, the "Sunshine for Regulatory Decrees and Settlements Act of 2013,"[1] John Walke, a senior attorney with the Natural Resources Defense Council, argued that "[u]nsubstantiated charges from those with an anti-regulatory political agenda should not form the basis for legislation." Do you agree?

2. Please explain how consent decree practices have resulted in beneficial settlements for all parties—including corporations—and produced good environmental outcomes.

3. How would H.R. 712 undermine judicial authority?

4. Why did Congress allow citizens to file suits against agencies?

5. What legal mechanisms are in place that would address the supposed "sue and settle" problem?

6. Under what circumstances does an agency typically agree to settle when it is sued for failure to issue a rule?

7. What are the principal flaws in the Chamber of Commerce's report entitled "Sue and Settle: Regulating Behind Closed Doors"?[2]

SCRUB Act

1. What are some of the problems with the proposed "regulatory cut-go" requirements contained in Title II of the SCRUB Act?

2. Title II of the SCRUB Act requires agencies to eliminate rules identified by the Commission and agreed to in a joint resolution by Congress.

   Are agencies able to simply rescind rules, or would agencies be required to go through the same notice-and-comment process that was required to issue the rule in the first place?

3. In a May 2012 article in *Bloomberg*, Mr. Kovacs stated that rescinding a rule is "just as hard as proposing one; it literally takes a full rulemaking process."[3] Do you agree? How long does a full rulemaking process take?

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[1] *Hearing on H.R. 1493, the "Sunshine for Regulatory Decrees and Settlements Act of 2013," Before the Subcomm. on Courts, Commercial and Administrative L. of the H. Comm. on the Judiciary*, 113th Cong. 1 (2013).
[2] William L. Kovacs et al., *Sue and Settle: Regulating Behind Closed Doors*, U.S. CHAMBER OF COMMERCE (May 2013), https://www.uschamber.com/sites/default/files/documents/files/SUEANDSETTLEREPORT-Final.pdf.

4. What are the ramifications of requiring the White House Office of Information and Regulatory Affairs (OIRA) to review certifications of independent agency cost estimates under section 203 of the SCRUB Act?

5. With respect to the current processes and procedures for retrospective review, how have agencies implemented Executive Orders 13,563 and 13,579?

6. Section 553(e) of the Administrative Procedure Act states that "[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule." How often is this process utilized? Does it already permit public participation in the regulatory process?

7. In a December 2014 report commissioned by the Administrative Conference of the United States (ACUS), Professor Joseph E. Aldy, an Assistant Professor of Public Policy at Harvard's John F. Kennedy School of Government, notes that even "absent a joint resolution, the recommended list of rules still imposes a meaningful constraint on regulators."[4] How does the SCRUB Act affect agency rulemaking even where Congress does not approve or has not yet approved the Commission's recommendations through a joint resolution?

8. In his 2014 report, Professor Aldy also found that regulatory cut-go is "inconsistent with fundamental principles of regulatory policy" because it subverts the role of government, which is "to correct failures in the operation of markets" through market interventions that maximize net social benefits."[5] What is your response?

9. At several points in the SCRUB Act, the term "costs to the United States economy" appears, but it is not defined. The bill also uses terms such as "excessive compliance costs" and "excessively burdensome." How would a court construe these terms if challenged? Would the court in essence be forced to define portions of the SCRUB Act?

10. The SCRUB Act also states that the Commission is required to "identify the annual cost of the rule," but is silent about the rule's benefit. Thus, if the annual cost of the rule is $20 million, but its benefits are $200 million, is that relevant to the Commission's analysis?

11. Under titles I and III of the SCRUB Act, would an agency that has eliminated a rule identified by the Commission— one that hypothetically has a cost of $10 million and

[3] Cheryl Bolen, *White House Continues Efforts To Review, Reduce Regulations*, BLOOMBERG GOV'T (May 14, 2012, 10:28 AM), http://www.bgov.com/news_item/7NsOkFAG9qqMeSBmtFS-hw.
[4] Joseph Aldy, *Learning from Experience: An Assessment of the Retrospective Reviews of Agency Rules and the Evidence for Improving the Design and Implementation of Regulatory Policy*, ADMIN. CONF. OF THE U.S. (Nov. 17, 2014), https://www.acus.gov/sites/default/files/documents/Aldy%2520Retro%2520Review%2520Draft%252011-17-2014.pdf.
[5] *Id.*

benefits of $8 million—be prevented from issuing a substantially similar new rule that has $10 million in costs and benefits of $220 million?

12. How does the SCRUB Act's look-back requirement differ from retrospective review currently required by executive orders?

RAPID Act

1. In his written testimony, Mr. Kovacs argues that the major cause of delays in federal permitting is the mandate to conduct environmental reviews under the National Environmental Policy Act (NEPA). What is your response?

2. In his written testimony, Mr. Kovacs lists various initiatives undertaken by the Obama Administration and the Council on Environmental Quality to improve environmental reviews, including guidelines to promote interagency cooperation.

   a) How have these initiatives have changed the project-approval process under NEPA?

   b) Rather than dramatically amending the project-approval process under NEPA that would only apply to a subset of projects subject to environmental review, wouldn't it make more sense to see how and whether these broad initiatives address the concerns you have raised?

Response to Questions for the Record from Amit Narang

Sunshine for Regulatory Decrees and Settlements Act

1. Yes, I do agree, and would add that this statement also applies to legislation premised on the false notion that regulations kill jobs in a macro-economic sense or harm the economy.
2. Consent decrees and settlements have been crucial to the public's health and safety as well as industry priorities. Such agreements have forced agencies to fully realize congressional intent in protecting the public and environment from harm, particularly with respect to air pollutants that Congress intended for the EPA to regulate under the Clean Air Act. Industry litigants have a long history of reaching such agreements with agencies as well. For example, the Clinton Administration's EPA reached a settlement with the American Petroleum Institute in 1995 to amend certain regulations.
3. Yes, H.R. 712 undermines judicial authority by interfering with the proper rule of the judiciary to ensure that laws, as written by Congress and signed into law by the President, are properly enforced. The proper role of the judiciary is to enforce the statutory deadlines set and written into law by Congress. H.R. 712 obstructs this function and needlessly delays, or potentially even prevents the judiciary from enforcing statutory deadlines.
4. Congress intended for citizen suits against agencies to be a crucial and fundamental way for everyday Americans to hold their government, and federal agencies specifically, accountable. Citizen suits have allowed citizens the critical right to bring agencies into court when those agencies have been unable to meet congressional deadlines, thereby serving as a mechanism for citizens to enforce legal requirements that Congress bestowed upon them. H.R. 712 tramples upon these foundational rights of citizens.
5. As noted in my testimony, agencies are prohibited from making settlements that determine the substance of any regulations that are mandated by such settlements. This strict policy was formalized by Attorney General Edwin Meese during the Reagan Administration and has established a clear safeguard that fundamentally undermines the accusation that agencies and litigants are involved in determining the eventual substance of any regulations during the settlement negotiations.
6. Agencies typically agree to settle when it is clear that they have little to no chance of winning the case in court. It would be an inappropriate use, potentially even abuse, of taxpayer funds for agencies to senselessly go to court knowing full well that they have no chance of prevailing upon the merits. Thus, it is entirely sensible for agencies to settle in these cases when the controversy turns on whether a non-discretionary agency action was achieved by a certain deadline established by law. If agencies have missed that deadline, there is no justification for agencies to engage in protracted litigation in court on the taxpayer's dime.
7. There are several critical flaws that undercut the credibility of the Chamber of Commerce's report. First, and most importantly, the report is able to produce absolutely no evidence backing up its claim that the Environmental Protection Agency (EPA) colluded with private litigants when reaching settlements over missed rulemaking deadlines. It simply lists those settlements and then defies logic by claiming that the fact EPA settled, thus leading to new environmental regulations mandated by Congress, is proof of collusion between the EPA and private litigants, in this case environmental groups. Second, the Report entirely ignores the many times agencies

have reached settlements or consent decrees with *industry* litigants under the George W. Bush administration, proving that the settlement mechanism is a neutral one that is often invoked by industry when they seek agency action, often deregulatory in nature, that was unlawfully withheld. It is hard to imagine that this omission is accidental. In any case, the fact that industry litigants have engaged in settlements over missed rulemaking deadlines is a glaring omission from the report and one that fatally weakens claims in the report that so-called "sue and settle" is one-sided and always cuts against industry interests.

Scrub Act:

1. As I noted in my written testimony, there a number of deeply concerning issues that arise when imposing a "regulatory cut-go" system on the existing regulatory process. There are also many potential unintended and difficult to anticipate consequences that would be problematic. For a fuller discussion, see pages
2. Under the bill, agencies would be required to rescind the rules identified by the Retrospective Regulatory Review Commission (Commission) within 60 days following joint Congressional approval of the Commission's recommendations. Agencies can also voluntarily adopt the Commission's recommendations and repeal those rules directly, irrespective of Congressional approval. Thus, none of the rules repealed under the bill would go through the notice-and-comment rulemaking process. This contravenes decades of administrative practice and supersedes basic requirements in the Administrative Procedure Act (APA). In essence, rule repeals under this bill would not be subject to any public participation or feedback and there is no requirement that agencies justify such repeals on a rational basis in a rulemaking record. In effect, agencies will be forced to treat rule repeals very differently than development of new rules, which is not surprising given the bill's primary and one-sided objective is deregulation. Nonetheless, such a process for rule repeals is in conflict with foundational and long-settled principles ensuring fairness, transparency, and rationality in the rulemaking process.
3. Mr. Kovacs is right that under current law, the APA requires agencies to follow the same process when rescinding rules as they must follow when promulgating new ones. Although the amount of time a full rulemaking typically takes is highly variable depending on the nature of the rule and the agency implementing it, for those rules that provide the most economic and non-economic benefits to consumers, working families, and the public, it is not unusual for such rules to take several years and even decades to complete. Indeed, it is frustration with the possibility that deregulatory measures could take this long that appears to be the motivation behind the SCRUB Act and its "fast-tracking" of rule repeals in the first place.
4. Allowing OIRA to review cost estimates from independent agencies would compromise those agencies' independence from the Executive Branch, thereby defying Congressional design and intent when designating independent agencies as such.
5. Agencies have been implementing Executive Orders 13,563 and 13,579 in a robust fashion, identifying numerous rules to repeal, modify, or strengthen, and according to Obama

Administration figures, saving the public over 20 billion dollars in compliance costs over the next 5 years. The Obama Administration intends to continue the retrospective review efforts throughout the remainder of the President's term.

6. The Section 553(e) petition process under the APA is one of the best ways for the public to identify an issue, problem, or concern for agencies that is within the agency's legal jurisdiction to address. Currently, the Administrative Conference of the United States is undertaking a study that should shed more light on how often the process is utilized and what reforms, if any, should be made to the process. Public Citizen has used section 553(e) to petition agencies numerous times in the past, including petitions that were accepted and are currently pending in rulemakings, as well as petitions that are currently awaiting review before agencies. One of the features of the petition process that makes it effective for public participation is the requirement that agencies respond to such petitions within a reasonable amount of time, often 90 days.
7. I agree with Professor Aldy that identification of rules that merit repeal by a congressionally authorized commission carries its own weight that will incentivize agencies to scrutinize such rules closely and potentially undertake those repeals independently. The flexibility of this approach has many advantages compared to the highly prescriptive approach in the SCRUB Act.
8. The lack of flexibility in the regulatory cut-go approach, combined with the inability for agencies to consider and adopt regulatory measures that have higher net benefits for the public, but could impose costs that are higher than allowed under regulatory cut-go, all confirm Professor Aldy's finding that regulatory cut-go is inconsistent with fundamental principles of regulatory policy.
9. The SCRUB's lack of explicit and precise definitions for these terms is problematic and may require judicial intervention to clarify if it was to become law. In particular, the ambiguity with respect to the term "costs to the economy" renders the bill unworkable given the crucial nature of the cost component in the regulatory cut-go process enshrined in title II of the bill.
10. Under the bill, only the cost of the rule would be relevant, irrespective of the benefits and the magnitude with which those benefits outweigh the rule's costs.
11. Assuming that the agency does not have additional cost savings to apply to promulgation of new rules, the hypothetical would be accurate in describing the effect of the SCRUB Act. The bill would operate to block an agency from putting forth a new rule that is substantially more beneficial to the public simply by virtue of the repealed rule's cost being slightly lower than the new rule's costs.
12. There are two primary differences. First, as mentioned previously, the SCRUB Act does not allow for notice and comment from the public prior to repeal of the rule by the agency, whereas as retrospective review orders implemented by the Executive Branch follow APA procedures allowing for notice and comment along with regulatory impact analysis if applicable. Second, the SCRUB Act does nothing to strengthen or modify ineffective rules or identify regulatory gaps that must be addressed through new regulatory standards. In contrast, the retrospective review process undertaken by executive order has the virtue of

being balanced in its approach by seeking out rules to strengthen or identifying regulatory gaps. A good example of this is the new protections for service-members against predatory lending under the Military Lending Act. The Department of Defense has identified this critical new regulation as one that is being strengthened under the Executive Order authorized retrospective review effort.

RAPID Act:

1. Mr. Kovacs is incorrect. In fact, there are numerous causes for delays in federal permitting entirely exclusive from the NEPA review process. Those reasons, often including significant local opposition to the approval of the project's permit, are further detailed in my written testimony.
2. My understanding is that the initiatives undertaken by the Obama Administration and the CEQ have made progress in streamlining the project permit approval process. I would advocate for restraint in consideration of a legislative solution before the Administration's efforts have been allowed to work.

I

114TH CONGRESS
1ST SESSION

H. R. 348

To provide for improved coordination of agency actions in the preparation and adoption of environmental documents for permitting determinations, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JANUARY 14, 2015

Mr. MARINO (for himself, Mr. PETERSON, Mr. GOODLATTE, Mr. MCKINLEY, and Mr. BLUM) introduced the following bill; which was referred to the Committee on the Judiciary, and in addition to the Committee on Natural Resources, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

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A BILL

To provide for improved coordination of agency actions in the preparation and adoption of environmental documents for permitting determinations, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Responsibly And Professionally Invigorating Development Act of 2015" or as the "RAPID Act".

SEC. 2. COORDINATION OF AGENCY ADMINISTRATIVE OPERATIONS FOR EFFICIENT DECISIONMAKING.

(a) IN GENERAL.—Chapter 5 of part 1 of title 5, United States Code, is amended by inserting after subchapter II the following:

"SUBCHAPTER IIA—INTERAGENCY COORDINATION REGARDING PERMITTING

"§ 560. Coordination of agency administrative operations for efficient decisionmaking

"(a) CONGRESSIONAL DECLARATION OF PURPOSE.—The purpose of this subchapter is to establish a framework and procedures to streamline, increase the efficiency of, and enhance coordination of agency administration of the regulatory review, environmental decisionmaking, and permitting process for projects undertaken, reviewed, or funded by Federal agencies. This subchapter will ensure that agencies administer the regulatory process in a manner that is efficient so that citizens are not burdened with regulatory excuses and time delays.

"(b) DEFINITIONS.—For purposes of this subchapter, the term—

"(1) 'agency' means any agency, department, or other unit of Federal, State, local, or Indian tribal government;

"(2) 'category of projects' means 2 or more projects related by project type, potential environ-

mental impacts, geographic location, or another similar project feature or characteristic;

"(3) 'environmental assessment' means a concise public document for which a Federal agency is responsible that serves to—

"(A) briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact;

"(B) aid an agency's compliance with NEPA when no environmental impact statement is necessary; and

"(C) facilitate preparation of an environmental impact statement when one is necessary;

"(4) 'environmental impact statement' means the detailed statement of significant environmental impacts required to be prepared under NEPA;

"(5) 'environmental review' means the Federal agency procedures for preparing an environmental impact statement, environmental assessment, categorical exclusion, or other document under NEPA;

"(6) 'environmental decisionmaking process' means the Federal agency procedures for undertaking and completion of any environmental permit, decision, approval, review, or study under any Fed-

eral law other than NEPA for a project subject to an environmental review;

"(7) 'environmental document' means an environmental assessment or environmental impact statement, and includes any supplemental document or document prepared pursuant to a court order;

"(8) 'finding of no significant impact' means a document by a Federal agency briefly presenting the reasons why a project, not otherwise subject to a categorical exclusion, will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared;

"(9) 'lead agency' means the Federal agency preparing or responsible for preparing the environmental document;

"(10) 'NEPA' means the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.);

"(11) 'project' means major Federal actions that are construction activities undertaken with Federal funds or that are construction activities that require approval by a permit or regulatory decision issued by a Federal agency;

"(12) 'project sponsor' means the agency or other entity, including any private or public-private

entity, that seeks approval for a project or is otherwise responsible for undertaking a project; and

"(13) 'record of decision' means a document prepared by a lead agency under NEPA following an environmental impact statement that states the lead agency's decision, identifies the alternatives considered by the agency in reaching its decision and states whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not adopted.

"(c) PREPARATION OF ENVIRONMENTAL DOCUMENTS.—Upon the request of the lead agency, the project sponsor shall be authorized to prepare any document for purposes of an environmental review required in support of any project or approval by the lead agency if the lead agency furnishes oversight in such preparation and independently evaluates such document and the document is approved and adopted by the lead agency prior to taking any action or making any approval based on such document.

"(d) ADOPTION AND USE OF DOCUMENTS.—

"(1) DOCUMENTS PREPARED UNDER NEPA.—

"(A) Not more than 1 environmental impact statement and 1 environmental assessment

shall be prepared under NEPA for a project (except for supplemental environmental documents prepared under NEPA or environmental documents prepared pursuant to a court order), and, except as otherwise provided by law, the lead agency shall prepare the environmental impact statement or environmental assessment. After the lead agency issues a record of decision, no Federal agency responsible for making any approval for that project may rely on a document other than the environmental document prepared by the lead agency.

"(B) Upon the request of a project sponsor, a lead agency may adopt, use, or rely upon secondary and cumulative impact analyses included in any environmental document prepared under NEPA for projects in the same geographic area where the secondary and cumulative impact analyses provide information and data that pertains to the NEPA decision for the project under review.

"(2) STATE ENVIRONMENTAL DOCUMENTS; SUPPLEMENTAL DOCUMENTS.—

"(A) Upon the request of a project sponsor, a lead agency may adopt a document that

has been prepared for a project under State laws and procedures as the environmental impact statement or environmental assessment for the project, provided that the State laws and procedures under which the document was prepared provide environmental protection and opportunities for public involvement that are substantially equivalent to NEPA.

"(B) An environmental document adopted under subparagraph (A) is deemed to satisfy the lead agency's obligation under NEPA to prepare an environmental impact statement or environmental assessment.

"(C) In the case of a document described in subparagraph (A), during the period after preparation of the document but before its adoption by the lead agency, the lead agency shall prepare and publish a supplement to that document if the lead agency determines that—

"(i) a significant change has been made to the project that is relevant for purposes of environmental review of the project; or

"(ii) there have been significant changes in circumstances or availability of

information relevant to the environmental review for the project.

"(D) If the agency prepares and publishes a supplemental document under subparagraph (C), the lead agency may solicit comments from agencies and the public on the supplemental document for a period of not more than 45 days beginning on the date of the publication of the supplement.

"(E) A lead agency shall issue its record of decision or finding of no significant impact, as appropriate, based upon the document adopted under subparagraph (A), and any supplements thereto.

"(3) CONTEMPORANEOUS PROJECTS.—If the lead agency determines that there is a reasonable likelihood that the project will have similar environmental impacts as a similar project in geographical proximity to the project, and that similar project was subject to environmental review or similar State procedures within the 5-year period immediately preceding the date that the lead agency makes that determination, the lead agency may adopt the environmental document that resulted from that environmental review or similar State procedure. The lead

agency may adopt such an environmental document, if it is prepared under State laws and procedures only upon making a favorable determination on such environmental document pursuant to paragraph (2)(A).

"(e) PARTICIPATING AGENCIES.—

"(1) IN GENERAL.—The lead agency shall be responsible for inviting and designating participating agencies in accordance with this subsection. The lead agency shall provide the invitation or notice of the designation in writing.

"(2) FEDERAL PARTICIPATING AGENCIES.—Any Federal agency that is required to adopt the environmental document of the lead agency for a project shall be designated as a participating agency and shall collaborate on the preparation of the environmental document, unless the Federal agency informs the lead agency, in writing, by a time specified by the lead agency in the designation of the Federal agency that the Federal agency—

"(A) has no jurisdiction or authority with respect to the project;

"(B) has no expertise or information relevant to the project; and

"(C) does not intend to submit comments on the project.

"(3) INVITATION.—The lead agency shall identify, as early as practicable in the environmental review for a project, any agencies other than an agency described in paragraph (2) that may have an interest in the project, including, where appropriate, Governors of affected States, and heads of appropriate tribal and local (including county) governments, and shall invite such identified agencies and officials to become participating agencies in the environmental review for the project. The invitation shall set a deadline of 30 days for responses to be submitted, which may only be extended by the lead agency for good cause shown. Any agency that fails to respond prior to the deadline shall be deemed to have declined the invitation.

"(4) EFFECT OF DECLINING PARTICIPATING AGENCY INVITATION.—Any agency that declines a designation or invitation by the lead agency to be a participating agency shall be precluded from submitting comments on any document prepared under NEPA for that project or taking any measures to oppose, based on the environmental review, any permit, license, or approval related to that project.

"(5) EFFECT OF DESIGNATION.—Designation as a participating agency under this subsection does not imply that the participating agency—

"(A) supports a proposed project; or

"(B) has any jurisdiction over, or special expertise with respect to evaluation of, the project.

"(6) COOPERATING AGENCY.—A participating agency may also be designated by a lead agency as a 'cooperating agency' under the regulations contained in part 1500 of title 40, Code of Federal Regulations, as in effect on January 1, 2011. Designation as a cooperating agency shall have no effect on designation as participating agency. No agency that is not a participating agency may be designated as a cooperating agency.

"(7) CONCURRENT REVIEWS.—Each Federal agency shall—

"(A) carry out obligations of the Federal agency under other applicable law concurrently and in conjunction with the review required under NEPA; and

"(B) in accordance with the rules made by the Council on Environmental Quality pursuant to subsection (n)(1), make and carry out such

rules, policies, and procedures as may be reasonably necessary to enable the agency to ensure completion of the environmental review and environmental decisionmaking process in a timely, coordinated, and environmentally responsible manner.

"(8) COMMENTS.—Each participating agency shall limit its comments on a project to areas that are within the authority and expertise of such participating agency. Each participating agency shall identify in such comments the statutory authority of the participating agency pertaining to the subject matter of its comments. The lead agency shall not act upon, respond to or include in any document prepared under NEPA, any comment submitted by a participating agency that concerns matters that are outside of the authority and expertise of the commenting participating agency.

"(f) PROJECT INITIATION REQUEST.—

"(1) NOTICE.—A project sponsor shall provide the Federal agency responsible for undertaking a project with notice of the initiation of the project by providing a description of the proposed project, the general location of the proposed project, and a statement of any Federal approvals anticipated to be nec-

essary for the proposed project, for the purpose of informing the Federal agency that the environmental review should be initiated.

"(2) LEAD AGENCY INITIATION.—The agency receiving a project initiation notice under paragraph (1) shall promptly identify the lead agency for the project, and the lead agency shall initiate the environmental review within a period of 45 days after receiving the notice required by paragraph (1) by inviting or designating agencies to become participating agencies, or, where the lead agency determines that no participating agencies are required for the project, by taking such other actions that are reasonable and necessary to initiate the environmental review.

"(g) ALTERNATIVES ANALYSIS.—

"(1) PARTICIPATION.—As early as practicable during the environmental review, but no later than during scoping for a project requiring the preparation of an environmental impact statement, the lead agency shall provide an opportunity for involvement by cooperating agencies in determining the range of alternatives to be considered for a project.

"(2) RANGE OF ALTERNATIVES.—Following participation under paragraph (1), the lead agency

shall determine the range of alternatives for consideration in any document which the lead agency is responsible for preparing for the project, subject to the following limitations:

"(A) NO EVALUATION OF CERTAIN ALTERNATIVES.—No Federal agency shall evaluate any alternative that was identified but not carried forward for detailed evaluation in an environmental document or evaluated and not selected in any environmental document prepared under NEPA for the same project.

"(B) ONLY FEASIBLE ALTERNATIVES EVALUATED.—Where a project is being constructed, managed, funded, or undertaken by a project sponsor that is not a Federal agency, Federal agencies shall only be required to evaluate alternatives that the project sponsor could feasibly undertake, consistent with the purpose of and the need for the project, including alternatives that can be undertaken by the project sponsor and that are technically and economically feasible.

"(3) METHODOLOGIES.—

"(A) IN GENERAL.—The lead agency shall determine, in collaboration with cooperating

agencies at appropriate times during the environmental review, the methodologies to be used and the level of detail required in the analysis of each alternative for a project. The lead agency shall include in the environmental document a description of the methodologies used and how the methodologies were selected.

"(B) NO EVALUATION OF INAPPROPRIATE ALTERNATIVES.—When a lead agency determines that an alternative does not meet the purpose and need for a project, that alternative is not required to be evaluated in detail in an environmental document.

"(4) PREFERRED ALTERNATIVE.—At the discretion of the lead agency, the preferred alternative for a project, after being identified, may be developed to a higher level of detail than other alternatives in order to facilitate the development of mitigation measures or concurrent compliance with other applicable laws if the lead agency determines that the development of such higher level of detail will not prevent the lead agency from making an impartial decision as to whether to accept another alternative which is being considered in the environmental review.

"(5) EMPLOYMENT ANALYSIS.—The evaluation of each alternative in an environmental impact statement or an environmental assessment shall identify the potential effects of the alternative on employment, including potential short-term and long-term employment increases and reductions and shifts in employment.

"(h) COORDINATION AND SCHEDULING.—

"(1) COORDINATION PLAN.—

"(A) IN GENERAL.—The lead agency shall establish and implement a plan for coordinating public and agency participation in and comment on the environmental review for a project or category of projects to facilitate the expeditious resolution of the environmental review.

"(B) SCHEDULE.—

"(i) IN GENERAL.—The lead agency shall establish as part of the coordination plan for a project, after consultation with each participating agency and, where applicable, the project sponsor, a schedule for completion of the environmental review. The schedule shall include deadlines, consistent with subsection (i), for decisions under any other Federal laws (including

the issuance or denial of a permit or license) relating to the project that is covered by the schedule.

"(ii) FACTORS FOR CONSIDERATION.—In establishing the schedule, the lead agency shall consider factors such as—

"(I) the responsibilities of participating agencies under applicable laws;

"(II) resources available to the participating agencies;

"(III) overall size and complexity of the project;

"(IV) overall schedule for and cost of the project;

"(V) the sensitivity of the natural and historic resources that could be affected by the project; and

"(VI) the extent to which similar projects in geographic proximity were recently subject to environmental review or similar State procedures.

"(iii) COMPLIANCE WITH THE SCHEDULE.—

"(I) All participating agencies shall comply with the time periods established in the schedule or with any modified time periods, where the lead agency modifies the schedule pursuant to subparagraph (D).

"(II) The lead agency shall disregard and shall not respond to or include in any document prepared under NEPA, any comment or information submitted or any finding made by a participating agency that is outside of the time period established in the schedule or modification pursuant to subparagraph (D) for that agency's comment, submission or finding.

"(III) If a participating agency fails to object in writing to a lead agency decision, finding or request for concurrence within the time period established under law or by the lead agency, the agency shall be deemed to have concurred in the decision, finding or request.

"(C) CONSISTENCY WITH OTHER TIME PERIODS.—A schedule under subparagraph (B) shall be consistent with any other relevant time periods established under Federal law.

"(D) MODIFICATION.—The lead agency may—

"(i) lengthen a schedule established under subparagraph (B) for good cause; and

"(ii) shorten a schedule only with the concurrence of the cooperating agencies.

"(E) DISSEMINATION.—A copy of a schedule under subparagraph (B), and of any modifications to the schedule, shall be—

"(i) provided within 15 days of completion or modification of such schedule to all participating agencies and to the project sponsor; and

"(ii) made available to the public.

"(F) ROLES AND RESPONSIBILITY OF LEAD AGENCY.—With respect to the environmental review for any project, the lead agency shall have authority and responsibility to take such actions as are necessary and proper, within the authority of the lead agency, to facilitate

the expeditious resolution of the environmental review for the project.

"(i) DEADLINES.—The following deadlines shall apply to any project subject to review under NEPA and any decision under any Federal law relating to such project (including the issuance or denial of a permit or license or any required finding):

"(1) ENVIRONMENTAL REVIEW DEADLINES.—The lead agency shall complete the environmental review within the following deadlines:

"(A) ENVIRONMENTAL IMPACT STATEMENT PROJECTS.—For projects requiring preparation of an environmental impact statement—

"(i) the lead agency shall issue an environmental impact statement within 2 years after the earlier of the date the lead agency receives the project initiation request or a Notice of Intent to Prepare an Environmental Impact Statement is published in the Federal Register; and

"(ii) in circumstances where the lead agency has prepared an environmental assessment and determined that an environmental impact statement will be required, the lead agency shall issue the environ-

mental impact statement within 2 years after the date of publication of the Notice of Intent to Prepare an Environmental Impact Statement in the Federal Register.

"(B) ENVIRONMENTAL ASSESSMENT PROJECTS.—For projects requiring preparation of an environmental assessment, the lead agency shall issue a finding of no significant impact or publish a Notice of Intent to Prepare an Environmental Impact Statement in the Federal Register within 1 year after the earlier of the date the lead agency receives the project initiation request, makes a decision to prepare an environmental assessment, or sends out participating agency invitations.

"(2) EXTENSIONS.—

"(A) REQUIREMENTS.—The environmental review deadlines may be extended only if—

"(i) a different deadline is established by agreement of the lead agency, the project sponsor, and all participating agencies; or

"(ii) the deadline is extended by the lead agency for good cause.

"(B) LIMITATION.—The environmental review shall not be extended by more than 1 year for a project requiring preparation of an environmental impact statement or by more than 180 days for a project requiring preparation of an environmental assessment.

"(3) ENVIRONMENTAL REVIEW COMMENTS.—

"(A) COMMENTS ON DRAFT ENVIRONMENTAL IMPACT STATEMENT.—For comments by agencies and the public on a draft environmental impact statement, the lead agency shall establish a comment period of not more than 60 days after publication in the Federal Register of notice of the date of public availability of such document, unless—

"(i) a different deadline is established by agreement of the lead agency, the project sponsor, and all participating agencies; or

"(ii) the deadline is extended by the lead agency for good cause.

"(B) OTHER COMMENTS.—For all other comment periods for agency or public comments in the environmental review process, the lead agency shall establish a comment period of no

more than 30 days from availability of the materials on which comment is requested, unless—

"(i) a different deadline is established by agreement of the lead agency, the project sponsor, and all participating agencies; or

"(ii) the deadline is extended by the lead agency for good cause.

"(4) DEADLINES FOR DECISIONS UNDER OTHER LAWS.—Notwithstanding any other provision of law, in any case in which a decision under any other Federal law relating to the undertaking of a project being reviewed under NEPA (including the issuance or denial of a permit or license) is required to be made, the following deadlines shall apply:

"(A) DECISIONS PRIOR TO RECORD OF DECISION OR FINDING OF NO SIGNIFICANT IMPACT.—If a Federal agency is required to approve, or otherwise to act upon, a permit, license, or other similar application for approval related to a project prior to the record of decision or finding of no significant impact, such Federal agency shall approve or otherwise act not later than the end of a 90-day period beginning—

"(i) after all other relevant agency review related to the project is complete; and

"(ii) after the lead agency publishes a notice of the availability of the final environmental impact statement or issuance of other final environmental documents, or no later than such other date that is otherwise required by law, whichever event occurs first.

"(B) OTHER DECISIONS.—With regard to any approval or other action related to a project by a Federal agency that is not subject to subparagraph (A), each Federal agency shall approve or otherwise act not later than the end of a period of 180 days beginning—

"(i) after all other relevant agency review related to the project is complete; and

"(ii) after the lead agency issues the record of decision or finding of no significant impact, unless a different deadline is established by agreement of the Federal agency, lead agency, and the project sponsor, where applicable, or the deadline is extended by the Federal agency for good cause, provided that such extension shall

not extend beyond a period that is 1 year after the lead agency issues the record of decision or finding of no significant impact.

"(C) FAILURE TO ACT.—In the event that any Federal agency fails to approve, or otherwise to act upon, a permit, license, or other similar application for approval related to a project within the applicable deadline described in subparagraph (A) or (B), the permit, license, or other similar application shall be deemed approved by such agency and the agency shall take action in accordance with such approval within 30 days of the applicable deadline described in subparagraph (A) or (B).

"(D) FINAL AGENCY ACTION.—Any approval under subparagraph (C) is deemed to be final agency action, and may not be reversed by any agency. In any action under chapter 7 seeking review of such a final agency action, the court may not set aside such agency action by reason of that agency action having occurred under this paragraph.

"(j) ISSUE IDENTIFICATION AND RESOLUTION.—

"(1) COOPERATION.—The lead agency and the participating agencies shall work cooperatively in accordance with this section to identify and resolve issues that could delay completion of the environmental review or could result in denial of any approvals required for the project under applicable laws.

"(2) LEAD AGENCY RESPONSIBILITIES.—The lead agency shall make information available to the participating agencies as early as practicable in the environmental review regarding the environmental, historic, and socioeconomic resources located within the project area and the general locations of the alternatives under consideration. Such information may be based on existing data sources, including geographic information systems mapping.

"(3) PARTICIPATING AGENCY RESPONSIBILITIES.—Based on information received from the lead agency, participating agencies shall identify, as early as practicable, any issues of concern regarding the project's potential environmental, historic, or socioeconomic impacts. In this paragraph, issues of concern include any issues that could substantially delay or prevent an agency from granting a permit or other approval that is needed for the project.

"(4) ISSUE RESOLUTION.—

"(A) MEETING OF PARTICIPATING AGENCIES.—At any time upon request of a project sponsor, the lead agency shall promptly convene a meeting with the relevant participating agencies and the project sponsor, to resolve issues that could delay completion of the environmental review or could result in denial of any approvals required for the project under applicable laws.

"(B) NOTICE THAT RESOLUTION CANNOT BE ACHIEVED.—If a resolution cannot be achieved within 30 days following such a meeting and a determination by the lead agency that all information necessary to resolve the issue has been obtained, the lead agency shall notify the heads of all participating agencies, the project sponsor, and the Council on Environmental Quality for further proceedings in accordance with section 204 of NEPA, and shall publish such notification in the Federal Register.

"(k) LIMITATION ON USE OF SOCIAL COST OF CARBON.—

"(1) IN GENERAL.—In the case of any environmental review or environmental decisionmaking process, a lead agency may not use the social cost of carbon.

"(2) DEFINITION.—In this subsection, the term 'social cost of carbon' means the social cost of carbon as described in the technical support document entitled 'Technical Support Document: Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order No. 12866', published by the Interagency Working Group on Social Cost of Carbon, United States Government, in May 2013, revised in November 2013, or any successor thereto or substantially related document, or any other estimate of the monetized damages associated with an incremental increase in carbon dioxide emissions in a given year.

"(l) REPORT TO CONGRESS.—The head of each Federal agency shall report annually to Congress—

"(1) the projects for which the agency initiated preparation of an environmental impact statement or environmental assessment;

"(2) the projects for which the agency issued a record of decision or finding of no significant impact

and the length of time it took the agency to complete the environmental review for each such project;

"(3) the filing of any lawsuits against the agency seeking judicial review of a permit, license, or approval issued by the agency for an action subject to NEPA, including the date the complaint was filed, the court in which the complaint was filed, and a summary of the claims for which judicial review was sought; and

"(4) the resolution of any lawsuits against the agency that sought judicial review of a permit, license, or approval issued by the agency for an action subject to NEPA.

"(m) LIMITATIONS ON CLAIMS.—

"(1) IN GENERAL.—Notwithstanding any other provision of law, a claim arising under Federal law seeking judicial review of a permit, license, or approval issued by a Federal agency for an action subject to NEPA shall be barred unless—

"(A) in the case of a claim pertaining to a project for which an environmental review was conducted and an opportunity for comment was provided, the claim is filed by a party that submitted a comment during the environmental review on the issue on which the party seeks ju-

dicial review, and such comment was sufficiently detailed to put the lead agency on notice of the issue upon which the party seeks judicial review; and

"(B) filed within 180 days after publication of a notice in the Federal Register announcing that the permit, license, or approval is final pursuant to the law under which the agency action is taken, unless a shorter time is specified in the Federal law pursuant to which judicial review is allowed.

"(2) NEW INFORMATION.—The preparation of a supplemental environmental impact statement, when required, is deemed a separate final agency action and the deadline for filing a claim for judicial review of such action shall be 180 days after the date of publication of a notice in the Federal Register announcing the record of decision for such action. Any claim challenging agency action on the basis of information in a supplemental environmental impact statement shall be limited to challenges on the basis of that information.

"(3) RULE OF CONSTRUCTION.—Nothing in this subsection shall be construed to create a right to judicial review or place any limit on filing a claim

that a person has violated the terms of a permit, license, or approval.

"(n) CATEGORIES OF PROJECTS.—The authorities granted under this subchapter may be exercised for an individual project or a category of projects.

"(o) EFFECTIVE DATE.—The requirements of this subchapter shall apply only to environmental reviews and environmental decisionmaking processes initiated after the date of enactment of this subchapter. In the case of a project for which an environmental review or environmental decisionmaking process was initiated prior to the date of enactment of this subchapter, the provisions of subsection (i) shall apply, except that, notwithstanding any other provision of this section, in determining a deadline under such subsection, any applicable period of time shall be calculated as beginning from the date of enactment of this subchapter.

"(p) APPLICABILITY.—Except as provided in subsection (p), this subchapter applies, according to the provisions thereof, to all projects for which a Federal agency is required to undertake an environmental review or make a decision under an environmental law for a project for which a Federal agency is undertaking an environmental review.

"(q) SAVINGS CLAUSE.—Nothing in this section shall be construed to supersede, amend, or modify sections 134, 135, 139, 325, 326, and 327 of title 23, sections 5303 and 5304 of title 49, or subtitle C of title I of division A of the Moving Ahead for Progress in the 21st Century Act and the amendments made by such subtitle (Public Law 112–141).".

(b) TECHNICAL AMENDMENT.—The table of sections for chapter 5 of title 5, United States Code, is amended by inserting after the items relating to subchapter II the following:

"SUBCHAPTER IIA—INTERAGENCY COORDINATION REGARDING PERMITTING

"560. Coordination of agency administrative operations for efficient decision-making.".

(c) REGULATIONS.—

(1) COUNCIL ON ENVIRONMENTAL QUALITY.—Not later than 180 days after the date of enactment of this division, the Council on Environmental Quality shall amend the regulations contained in part 1500 of title 40, Code of Federal Regulations, to implement the provisions of this division and the amendments made by this division, and shall by rule designate States with laws and procedures that satisfy the criteria under section 560(d)(2)(A) of title 5, United States Code.

(2) FEDERAL AGENCIES.—Not later than 120 days after the date that the Council on Environmental Quality amends the regulations contained in part 1500 of title 40, Code of Federal Regulations, to implement the provisions of this division and the amendments made by this division, each Federal agency with regulations implementing the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) shall amend such regulations to implement the provisions of this division.

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114TH CONGRESS
1ST SESSION

H. R. 712

To impose certain limitations on consent decrees and settlement agreements by agencies that require the agencies to take regulatory action in accordance with the terms thereof, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 4, 2015

Mr. COLLINS of Georgia (for himself, Mr. YOHO, Mr. LATTA, Mr. FARENTHOLD, Mrs. ELLMERS, Mr. MARINO, Mr. GOODLATTE, Mr. SMITH of Texas, Mr. CHABOT, and Mr. TROTT) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To impose certain limitations on consent decrees and settlement agreements by agencies that require the agencies to take regulatory action in accordance with the terms thereof, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Sunshine for Regulatory Decrees and Settlements Act of 2015".

SEC. 2. DEFINITIONS.

In this Act—

(1) the terms "agency" and "agency action" have the meanings given those terms under section 551 of title 5, United States Code;

(2) the term "covered civil action" means a civil action—

(A) seeking to compel agency action;

(B) alleging that the agency is unlawfully withholding or unreasonably delaying an agency action relating to a regulatory action that would affect the rights of—

(i) private persons other than the person bringing the action; or

(ii) a State, local, or tribal government; and

(C) brought under—

(i) chapter 7 of title 5, United States Code; or

(ii) any other statute authorizing such an action;

(3) the term "covered consent decree" means—

(A) a consent decree entered into in a covered civil action; and

(B) any other consent decree that requires agency action relating to a regulatory action that affects the rights of—

(i) private persons other than the person bringing the action; or

(ii) a State, local, or tribal government;

(4) the term "covered consent decree or settlement agreement" means a covered consent decree and a covered settlement agreement; and

(5) the term "covered settlement agreement" means—

(A) a settlement agreement entered into in a covered civil action; and

(B) any other settlement agreement that requires agency action relating to a regulatory action that affects the rights of—

(i) private persons other than the person bringing the action; or

(ii) a State, local, or tribal government.

SEC. 3. CONSENT DECREE AND SETTLEMENT REFORM.

(a) PLEADINGS AND PRELIMINARY MATTERS.—

(1) IN GENERAL.—In any covered civil action, the agency against which the covered civil action is brought shall publish the notice of intent to sue and the complaint in a readily accessible manner, including by making the notice of intent to sue and the

complaint available online not later than 15 days after receiving service of the notice of intent to sue or complaint, respectively.

(2) ENTRY OF A COVERED CONSENT DECREE OR SETTLEMENT AGREEMENT.—A party may not make a motion for entry of a covered consent decree or to dismiss a civil action pursuant to a covered settlement agreement until after the end of proceedings in accordance with paragraph (1) and subparagraphs (A) and (B) of paragraph (2) of subsection (d) or subsection (d)(3)(A), whichever is later.

(b) INTERVENTION.—

(1) REBUTTABLE PRESUMPTION.—In considering a motion to intervene in a covered civil action or a civil action in which a covered consent decree or settlement agreement has been proposed that is filed by a person who alleges that the agency action in dispute would affect the person, the court shall presume, subject to rebuttal, that the interests of the person would not be represented adequately by the existing parties to the action.

(2) STATE, LOCAL, AND TRIBAL GOVERNMENTS.—In considering a motion to intervene in a covered civil action or a civil action in which a covered consent decree or settlement agreement has

been proposed that is filed by a State, local, or tribal government, the court shall take due account of whether the movant—

(A) administers jointly with an agency that is a defendant in the action the statutory provisions that give rise to the regulatory action to which the action relates; or

(B) administers an authority under State, local, or tribal law that would be preempted by the regulatory action to which the action relates.

(c) SETTLEMENT NEGOTIATIONS.—Efforts to settle a covered civil action or otherwise reach an agreement on a covered consent decree or settlement agreement shall—

(1) be conducted pursuant to the mediation or alternative dispute resolution program of the court or by a district judge other than the presiding judge, magistrate judge, or special master, as determined appropriate by the presiding judge; and

(2) include any party that intervenes in the action.

(d) PUBLICATION OF AND COMMENT ON COVERED CONSENT DECREES OR SETTLEMENT AGREEMENTS.—

(1) IN GENERAL.—Not later than 60 days before the date on which a covered consent decree or

settlement agreement is filed with a court, the agency seeking to enter the covered consent decree or settlement agreement shall publish in the Federal Register and online—

(A) the proposed covered consent decree or settlement agreement; and

(B) a statement providing—

(i) the statutory basis for the covered consent decree or settlement agreement; and

(ii) a description of the terms of the covered consent decree or settlement agreement, including whether it provides for the award of attorneys' fees or costs and, if so, the basis for including the award.

(2) PUBLIC COMMENT.—

(A) IN GENERAL.—An agency seeking to enter a covered consent decree or settlement agreement shall accept public comment during the period described in paragraph (1) on any issue relating to the matters alleged in the complaint in the applicable civil action or addressed or affected by the proposed covered consent decree or settlement agreement.

(B) RESPONSE TO COMMENTS.—An agency shall respond to any comment received under subparagraph (A).

(C) SUBMISSIONS TO COURT.—When moving that the court enter a proposed covered consent decree or settlement agreement or for dismissal pursuant to a proposed covered consent decree or settlement agreement, an agency shall—

(i) inform the court of the statutory basis for the proposed covered consent decree or settlement agreement and its terms;

(ii) submit to the court a summary of the comments received under subparagraph (A) and the response of the agency to the comments;

(iii) submit to the court a certified index of the administrative record of the notice and comment proceeding; and

(iv) make the administrative record described in clause (iii) fully accessible to the court.

(D) INCLUSION IN RECORD.—The court shall include in the court record for a civil ac-

tion the certified index of the administrative record submitted by an agency under subparagraph (C)(iii) and any documents listed in the index which any party or amicus curiae appearing before the court in the action submits to the court.

(3) PUBLIC HEARINGS PERMITTED.—

(A) IN GENERAL.—After providing notice in the Federal Register and online, an agency may hold a public hearing regarding whether to enter into a proposed covered consent decree or settlement agreement.

(B) RECORD.—If an agency holds a public hearing under subparagraph (A)—

(i) the agency shall—

(I) submit to the court a summary of the proceedings;

(II) submit to the court a certified index of the hearing record; and

(III) provide access to the hearing record to the court; and

(ii) the full hearing record shall be included in the court record.

(4) MANDATORY DEADLINES.—If a proposed covered consent decree or settlement agreement re-

quires an agency action by a date certain, the agency shall, when moving for entry of the covered consent decree or settlement agreement or dismissal based on the covered consent decree or settlement agreement, inform the court of—

(A) any required regulatory action the agency has not taken that the covered consent decree or settlement agreement does not address;

(B) how the covered consent decree or settlement agreement, if approved, would affect the discharge of the duties described in subparagraph (A); and

(C) why the effects of the covered consent decree or settlement agreement on the manner in which the agency discharges its duties is in the public interest.

(c) SUBMISSION BY THE GOVERNMENT.—

(1) IN GENERAL.—For any proposed covered consent decree or settlement agreement that contains a term described in paragraph (2), the Attorney General or, if the matter is being litigated independently by an agency, the head of the agency shall submit to the court a certification that the Attorney General or head of the agency approves the proposed

covered consent decree or settlement agreement. The Attorney General or head of the agency shall personally sign any certification submitted under this paragraph.

(2) TERMS.—A term described in this paragraph is—

(A) in the case of a covered consent decree, a term that—

(i) converts into a nondiscretionary duty a discretionary authority of an agency to propose, promulgate, revise, or amend regulations;

(ii) commits an agency to expend funds that have not been appropriated and that have not been budgeted for the regulatory action in question;

(iii) commits an agency to seek a particular appropriation or budget authorization;

(iv) divests an agency of discretion committed to the agency by statute or the Constitution of the United States, without regard to whether the discretion was granted to respond to changing circumstances, to make policy or managerial

choices, or to protect the rights of third parties; or

(v) otherwise affords relief that the court could not enter under its own authority upon a final judgment in the civil action; or

(B) in the case of a covered settlement agreement, a term—

(i) that provides a remedy for a failure by the agency to comply with the terms of the covered settlement agreement other than the revival of the civil action resolved by the covered settlement agreement; and

(ii) that—

(I) interferes with the authority of an agency to revise, amend, or issue rules under the procedures set forth in chapter 5 of title 5, United States Code, or any other statute or Executive order prescribing rulemaking procedures for a rulemaking that is the subject of the covered settlement agreement;

(II) commits the agency to expend funds that have not been appropriated and that have not been budgeted for the regulatory action in question; or

(III) for such a covered settlement agreement that commits the agency to exercise in a particular way discretion which was committed to the agency by statute or the Constitution of the United States to respond to changing circumstances, to make policy or managerial choices, or to protect the rights of third parties.

(f) REVIEW BY COURT.—

(1) AMICUS.—A court considering a proposed covered consent decree or settlement agreement shall presume, subject to rebuttal, that it is proper to allow amicus participation relating to the covered consent decree or settlement agreement by any person who filed public comments or participated in a public hearing on the covered consent decree or settlement agreement under paragraph (2) or (3) of subsection (d).

(2) REVIEW OF DEADLINES.—

(A) PROPOSED COVERED CONSENT DECREES.—For a proposed covered consent decree, a court shall not approve the covered consent decree unless the proposed covered consent decree allows sufficient time and incorporates adequate procedures for the agency to comply with chapter 5 of title 5, United States Code, and other applicable statutes that govern rulemaking and, unless contrary to the public interest, the provisions of any Executive order that governs rulemaking.

(B) PROPOSED COVERED SETTLEMENT AGREEMENTS.—For a proposed covered settlement agreement, a court shall ensure that the covered settlement agreement allows sufficient time and incorporates adequate procedures for the agency to comply with chapter 5 of title 5, United States Code, and other applicable statutes that govern rulemaking and, unless contrary to the public interest, the provisions of any Executive order that governs rulemaking.

(g) ANNUAL REPORTS.—Each agency shall submit to Congress an annual report that, for the year covered by the report, includes—

(1) the number, identity, and content of covered civil actions brought against and covered consent decrees or settlement agreements entered against or into by the agency; and

(2) a description of the statutory basis for—

(A) each covered consent decree or settlement agreement entered against or into by the agency; and

(B) any award of attorneys fees or costs in a civil action resolved by a covered consent decree or settlement agreement entered against or into by the agency.

SEC. 4. MOTIONS TO MODIFY CONSENT DECREES.

If an agency moves a court to modify a covered consent decree or settlement agreement and the basis of the motion is that the terms of the covered consent decree or settlement agreement are no longer fully in the public interest due to the obligations of the agency to fulfill other duties or due to changed facts and circumstances, the court shall review the motion and the covered consent decree or settlement agreement de novo.

SEC. 5. EFFECTIVE DATE.

This Act shall apply to—

(1) any covered civil action filed on or after the date of enactment of this Act; and

(2) any covered consent decree or settlement agreement proposed to a court on or after the date of enactment of this Act.

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114TH CONGRESS
1ST SESSION

H. R. _____

To provide for the establishment of a process for the review of rules and sets of rules, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

Mr. SMITH of Missouri introduced the following bill; which was referred to the Committee on _____

A BILL

To provide for the establishment of a process for the review of rules and sets of rules, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Searching for and Cutting Regulations that are Unnecessarily Burdensome Act of 2015" or as the "SCRUB Act of 2015".

SEC. 2. TABLE OF CONTENTS.

TITLE I—RETROSPECTIVE REGULATORY REVIEW COMMISSION

SEC. 101. IN GENERAL.

(a) ESTABLISHMENT.—There is established a commission, to be known as the "Retrospective Regulatory Review Commission", that shall review rules and sets of rules in accordance with specified criteria to determine if a rule or set of rules should be repealed to eliminate or reduce the costs of regulation to the economy. The Commission shall terminate on the date that is 5 years and 180 days after the date of enactment of this Act or 5 years after the date by which all Commission members' terms have commenced, whichever is later.

(b) MEMBERSHIP.—

(1) NUMBER.—The Commission shall be composed of 9 members who shall be appointed by the President and confirmed by the Senate. Each mem-

ber shall be appointed not later than 180 days after the date of enactment of this Act.

(2) TERM.—The term of each member shall commence upon the member's confirmation by the Senate and shall extend to the date that is 5 years and 180 days after the date of enactment of this Act or that is 5 years after the date by which all members have been confirmed by the Senate, whichever is later.

(3) APPOINTMENT.—The members of the Commission shall be appointed as follows:

(A) CHAIR.—The President shall appoint as the Chair of the Commission an individual with expertise and experience in rulemaking, such as past Administrators of the Office of Information and Regulatory Affairs, past chairmen of the Administrative Conference of the United States, and other individuals with similar expertise and experience in rulemaking affairs and the administration of regulatory reviews.

(B) CANDIDATE LIST OF MEMBERS.—The Speaker of the House of Representatives, the Minority Leader of the House of Representatives, the Majority Leader of the Senate, and

the Minority Leader of the Senate shall each present to the President a list of candidates to be members of the Commission. Such candidates shall be individuals learned in rulemaking affairs and, preferably, administration of regulatory reviews. The President shall appoint 2 members of the Commission from each list provided under this subparagraph, subject to the provisions of subparagraph (C).

(C) RESUBMISSION OF CANDIDATE.—The President may request from the presenter of the list under subparagraph (B) a new list of one or more candidates if the President—

(i) determines that any candidate on the list presented pursuant to subparagraph (B) does not meet the qualifications specified in such subparagraph to be a member of the Commission; and

(ii) certifies that determination to the congressional officials specified in subparagraph (B).

(c) POWERS AND AUTHORITIES OF THE COMMISSION.—

(1) MEETINGS.—The Commission may meet when, where, and as often as the Commission deter-

mines appropriate, except that the Commission shall hold public meetings not less than twice each year. All meetings of the Commission shall be open to the public.

(2) HEARINGS.—In addition to meetings held under paragraph (1), the Commission may hold hearings to consider issues of fact or law relevant to the Commission's work. Any hearing held by the Commission shall be open to the public.

(3) ACCESS TO INFORMATION.—The Commission may secure directly from any agency information and documents necessary to enable the Commission to carry out this Act. Upon request of the Chair of the Commission, the head of that agency shall furnish that information or document to the Commission as soon as possible, but not later than two weeks after the date on which the request was made.

(4) SUBPOENAS.—

(A) IN GENERAL.—The Commission may issue subpoenas requiring the attendance and testimony of witnesses and the production of any evidence relating to the duties of the Commission. The attendance of witnesses and the production of evidence may be required from any place within the United States at any des-

ignated place of hearing within the United States.

(B) FAILURE TO OBEY A SUBPOENA.—If a person refuses to obey a subpoena issued under subparagraph (A), the Commission may apply to a United States district court for an order requiring that person to appear before the Commission to give testimony, produce evidence, or both, relating to the matter under investigation. The application may be made within the judicial district where the hearing is conducted or where that person is found, resides, or transacts business. Any failure to obey the order of the court may be punished by the court as civil contempt.

(C) SERVICE OF SUBPOENAS.—The subpoenas of the Commission shall be served in the manner provided for subpoenas issued by a United States district court under the Federal Rules of Civil Procedure for the United States district courts.

(D) SERVICE OF PROCESS.—All process of any court to which application is made under subparagraph (B) may be served in the judicial district in which the person required to be served resides or may be found.

(d) PAY AND TRAVEL EXPENSES.—

(1) PAY.—

(A) MEMBERS.—Each member, other than the Chair of the Commission, shall be paid at a rate equal to the daily equivalent of the minimum annual rate of basic pay payable for level IV of the Executive Schedule under section 5315 of title 5, United States Code, for each day (including travel time) during which the member is engaged in the actual performance of duties vested in the Commission.

(B) CHAIR.—The Chair shall be paid for each day referred to in subparagraph (A) at a rate equal to the daily equivalent of the minimum annual rate of basic pay payable for level III of the Executive Schedule under section 5314 of title 5, United States Code.

(2) TRAVEL EXPENSES.—Members shall receive travel expenses, including per diem in lieu of subsistence, in accordance with sections 5702 and 5703 of title 5, United States Code.

(e) DIRECTOR OF STAFF.—

(1) IN GENERAL.—The Commission shall appoint a Director.

(2) PAY.—The Director shall be paid at the rate of basic pay payable for level V of the Executive Schedule under section 5316 of title 5, United States Code.

(f) STAFF.—

(1) IN GENERAL.—Subject to paragraph (2), the Director, with the approval of the Commission, may appoint, fix the pay of, and terminate additional personnel.

(2) LIMITATIONS ON APPOINTMENT.—The Director may make such appointments without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, and any personnel so appointed may be paid without regard to the provisions of chapter 51 and subchapter III of chapter 53 of that title relating to classification and General Schedule pay rates, except that an individual so appointed may not receive pay in excess of the annual rate of basic pay payable for GS–15 of the General Schedule.

(3) AGENCY ASSISTANCE.—Following consultation with and upon request of the Chair of the Commission, the head of any agency may detail any of the personnel of that agency to the Commission to

assist the Commission in carrying out the duties of the Commission under this Act.

(4) GAO AND OIRA ASSISTANCE.—The Comptroller General of the United States and the Administrator of the Office of Information and Regulatory Affairs shall provide assistance, including the detailing of employees, to the Commission in accordance with an agreement entered into with the Commission.

(5) ASSISTANCE FROM OTHER PARTIES.—Congress, the States, municipalities, federally recognized Indian tribes, and local governments may provide assistance, including the detailing of employees, to the Commission in accordance with an agreement entered into with the Commission.

(g) OTHER AUTHORITY.—

(1) EXPERTS AND CONSULTANTS.—The Commission may procure by contract, to the extent funds are available, the temporary or intermittent services of experts or consultants pursuant to section 3109 of title 5, United States Code.

(2) PROPERTY.—The Commission may lease space and acquire personal property to the extent funds are available.

(h) DUTIES OF THE COMMISSION.—

(1) IN GENERAL.—The Commission shall conduct a review of the Code of Federal Regulations to identify rules and sets of rules that collectively implement a regulatory program that should be repealed to lower the cost of regulation to the economy. The Commission shall give priority in the review to rules or sets of rules that are major rules or include major rules, have been in effect more than 15 years, impose paperwork burdens that could be reduced substantially without significantly diminishing regulatory effectiveness, impose disproportionately high costs on entities that qualify as small entities within the meaning of section 601(6) of title 5, United States Code, or could be strengthened in their effectiveness while reducing regulatory costs. The Commission shall have as a goal of the Commission to achieve a reduction of at least 15 percent in the cumulative costs of Federal regulation with a minimal reduction in the overall effectiveness of such regulation.

(2) NATURE OF REVIEW.—To identify which rules and sets of rules should be repealed to lower the cost of regulation to the economy, the Commission shall apply the following criteria:

(A) Whether the original purpose of the rule or set of rules was achieved, and the rule or set of rules could be repealed without significant recurrence of adverse effects or conduct that the rule or set of rules was intended to prevent or reduce.

(B) Whether the implementation, compliance, administration, enforcement or other costs of the rule or set of rules to the economy are not justified by the benefits to society within the United States produced by the expenditure of those costs.

(C) Whether the rule or set of rules has been rendered unnecessary or obsolete, taking into consideration the length of time since the rule was made and the degree to which technology, economic conditions, market practices, or other relevant factors have changed in the subject area affected by the rule or set of rules.

(D) Whether the rule or set of rules is ineffective at achieving the purposes of the rule or set of rules.

(E) Whether the rule or set of rules overlaps, duplicates, or conflicts with other Federal

rules, and to the extent feasible, with State and local governmental rules.

(F) Whether the rule or set of rules has excessive compliance costs or is otherwise excessively burdensome, as compared to alternatives that—

(i) specify performance objectives rather than conduct or manners of compliance;

(ii) establish economic incentives to encourage desired behavior;

(iii) provide information upon which choices can be made by the public;

(iv) incorporate other innovative alternatives rather than agency actions that specify conduct or manners of compliance; or

(v) could in other ways substantially lower costs without significantly undermining effectiveness.

(G) Whether the rule or set of rules inhibits innovation in or growth of the United States economy, such as by impeding the introduction or use of safer or equally safe technology that is newer or more efficient than technology re-

quired by or permissible under the rule or set of rules.

(H) Whether or not the rule or set of rules harms competition within the United States economy or the international economic competitiveness of enterprises or entities based in the United States.

(I) Such other criteria as the Commission devises to identify rules and sets of rules that can be repealed to eliminate or reduce unnecessarily burdensome costs to the United States economy.

(3) METHODOLOGY FOR REVIEW.—The Commission shall establish a methodology for conducting the review (including an overall review and discrete reviews of portions of the Code of Federal Regulations), identifying rules and sets of rules, and classifying rules under this subsection and publish the terms of the methodology in the Federal Register and on the website of the Commission. The Commission may propose and seek public comment on the methodology before the methodology is established.

(4) CLASSIFICATION OF RULES AND SETS OF RULES.—

(A) IN GENERAL.—After completion of any review of rules or sets of rules under paragraph (2), the Commission shall classify each rule or set of rules identified in the review to qualify for recommended repeal as either a rule or set of rules—

(i) on which immediate action to repeal is recommended; or

(ii) that should be eligible for repeal under regulatory cut-go procedures under title II.

(B) DECISIONS BY MAJORITY.—Each decision by the Commission to identify a rule or set of rules for classification under this paragraph, and each decision whether to classify the rule or set of rules under clause (i) or (ii) of subparagraph (A), shall be made by a simple majority vote of the Commission. No such vote shall take place until after all members of the Commission have been confirmed by the Senate.

(5) INITIATION OF REVIEW BY OTHER PERSONS.—

(A) IN GENERAL.—The Commission may also conduct a review under paragraph (2) of, and, if appropriate, classify under paragraph

(4), any rule or set of rules that is submitted for review to the Commission by—

(i) the President;

(ii) a Member of Congress;

(iii) any officer or employee of a Federal, State, local or tribal government, or regional governmental body; or

(iv) any member of the public.

(B) FORM OF SUBMISSION.—A submission to the Commission under this paragraph shall—

(i) identify the specific rule or set of rules submitted for review;

(ii) provide a statement of evidence to demonstrate that the rule or set of rules qualifies to be identified for repeal under the criteria listed in paragraph (2); and

(iii) such other information as the submitter believes may be helpful to the Commission's review, including a statement of the submitter's interest in the matter.

(C) PUBLIC AVAILABILITY.—The Commission shall make each submission received under this paragraph available on the website of the

Commission as soon as possible, but not later than 1 week after the date on which the submission was received.

(i) NOTICES AND REPORTS OF THE COMMISSION.—

(1) NOTICES OF AND REPORTS ON ACTIVITIES.—The Commission shall publish, in the Federal Register and on the website of the Commission—

(A) notices in advance of all public meetings, hearings, and classifications under subsection (h) informing the public of the basis, purpose, and procedures for the meeting, hearing, or classification; and

(B) reports after the conclusion of any public meeting, hearing, or classification under subsection (h) summarizing in detail the basis, purpose, and substance of the meeting, hearing, or classification.

(2) ANNUAL REPORTS TO CONGRESS.—Each year, beginning on the date that is one year after the date on which all Commission members have been confirmed by the Senate, the Commission shall submit a report simultaneously to each House of Congress detailing the activities of the Commission for the previous year, and listing all rules and sets of rules classified under subsection (h) during that

year. For each rule or set of rules so listed, the Commission shall—

(A) identify the agency that made the rule or set of rules;

(B) identify the annual cost of the rule or set of rules to the United States economy and the basis upon which the Commission identified that cost;

(C) identify whether the rule or set of rules was classified under clause (i) or clause (ii) of subsection (h)(4)(A);

(D) identify the criteria under subsection (h)(2) that caused the classification of the rule or set of rules and the basis upon which the Commission determined that those criteria were met;

(E) for each rule or set of rules listed under the criteria set forth in subparagraphs (B), (D), (F), (G), or (H) of subsection (h)(2), or other criteria established by the Commission under subparagraph (I) of such subsection under which the Commission evaluated alternatives to the rule or set of rules that could lead to lower regulatory costs, identify alternatives to the rule or set of rules that the Com-

mission recommends the agency consider as replacements for the rule or set of rules and the basis on which the Commission rests the recommendations, and, in identifying such alternatives, emphasize alternatives that will achieve regulatory effectiveness at the lowest cost and with the lowest adverse impacts on jobs;

(F) for each rule or set of rules listed under the criteria set forth in subsection (h)(2)(E), the other Federal, State, or local governmental rules that the Commission found the rule or set of rules to overlap, duplicate, or conflict with, and the basis for the findings of the Commission; and

(G) in the case of each set of rules so listed, analyze whether Congress should also consider repeal of the statutory authority implemented by the set of rules.

(3) FINAL REPORT.—Not later than the date on which the Commission members' appointments expire, the Commission shall submit a final report simultaneously to each House of Congress summarizing all activities and recommendations of the Commission, including a list of all rules or sets of rules the Commission classified under clause (i) of

subsection (h)(4)(A) for immediate action to repeal, a separate list of all rules or sets of rules the Commission classified under clause (ii) of subsection (h)(4)(A) for repeal, and with regard to each rule or set of rules listed on either list, the information described in subparagraphs (A) through (F) of subsection (h)(2). This report may be included in the final annual report of the Commission under paragraph (2) and may include the Commission's recommendation whether the Commission should be reauthorized by Congress.

(j) REPEAL OF REGULATIONS; CONGRESSIONAL CONSIDERATION OF COMMISSION REPORTS.—

(1) IN GENERAL.—Subject to paragraph (2)—

(A) the head of each agency with authority to repeal a rule or set of rules classified by the Commission under subsection (h)(4)(A)(i) for immediate action to repeal and newly listed as such in an annual or final report of the Commission under paragraph (2) or (3) of subsection (i) shall repeal the rule or set of rules as recommended by the Commission within 60 days after the enactment of a joint resolution under paragraph (2) for approval of the rec-

ommendations of the Commission in the report; and

(B) the head of each agency with authority to repeal a rule or set of rules classified by the Commission under subsection (h)(4)(A)(ii) for repeal and newly listed as such in an annual or final report of the Commission under paragraph (2) or (3) of subsection (i) shall repeal the rule or set of rules as recommended by the Commission pursuant to section 201, following the enactment of a joint resolution under paragraph (2) for approval of the recommendations of the Commission in the report.

(2) CONGRESSIONAL APPROVAL.—

(A) IN GENERAL.—No head of an agency described in paragraph (1) shall be required by this Act to carry out a repeal listed by the Commission in a report transmitted to Congress under paragraph (2) or (3) of subsection (i) until a joint resolution is enacted, in accordance with the provisions of subparagraph (B), approving such recommendations of the Commission for repeal.

(B) TERMS OF THE RESOLUTION.—For purposes of paragraph (A), the term ''joint res-

olution" means only a joint resolution which is introduced after the date on which the Commission transmits to the Congress under paragraph (2) or (3) of subsection (i) the report containing the recommendations to which the resolution pertains, and—

(i) which does not have a preamble;

(ii) the matter after the resolving clause of which is only as follows: "That Congress approves the recommendations for repeal of the Retrospective Regulatory Review Commission as submitted by the Commission on _____", the blank space being filled in with the appropriate date; and

(iii) the title of which is as follows: "Approving recommendations for repeal of the Retrospective Regulatory Review Commission.".

(3) REISSUANCE OF RULES.—

(A) NO SUBSTANTIALLY SIMILAR RULE TO BE REISSUED.—A rule that is repealed under paragraph (1) or section 201 may not be reissued in substantially the same form, and a new rule that is substantially the same as such

a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution approving the Commission's recommendation to repeal the original rule.

(B) AGENCY TO ENSURE AVOIDANCE OF SIMILAR DEFECTS.—An agency, in making any new rule to implement statutory authority previously implemented by a rule repealed under paragraph (1) or section 201, shall ensure that the new rule does not result in the same adverse effects of the repealed rule that caused the Commission to recommend to Congress the latter's repeal and will not result in new adverse effects of the kind described in the criteria specified in or under subsection (h).

(k) AUTHORIZATION OF APPROPRIATIONS.—

(1) IN GENERAL.—There are authorized to be appropriated such sums as may be necessary to the Commission to carry out this Act, not to exceed $30,000,000.

(2) AVAILABILITY.—Any sums appropriated under the authorization contained in this section shall remain available, without fiscal year limitation, until the earlier of the date that such sums are ex-

pended or the date of the termination of the Commission.

(l) WEBSITE.—

(1) IN GENERAL.—The Commission shall establish a public website that—

(A) uses current information technology to make records available on the website;

(B) provides information in a standard data format; and

(C) receives and publishes public comments.

(2) PUBLISHING OF INFORMATION.—Any information required to be made available on the website established pursuant to this Act shall be published in a timely manner and shall be accessible by the public on the website at no cost.

(3) RECORD OF PUBLIC MEETINGS AND HEARINGS.—All records of public meetings and hearings shall be published on the website as soon as possible, but not later than 1 week after the date on which such public meeting or hearing occurred.

(4) PUBLIC COMMENTS.—The Commission shall publish on the website all public comments and submissions.

(5) NOTICES.—The Commission shall publish on the website notices of all public meetings and hearings at least one week before the date on which such public meeting or hearing occurs.

(m) APPLICABILITY OF THE FEDERAL ADVISORY COMMITTEE ACT.—

(1) IN GENERAL.—Except as otherwise provided in this Act, the Commission shall be subject to the provisions of the Federal Advisory Committee Act (5 U.S.C. App.).

(2) ADVISORY COMMITTEE MANAGEMENT OFFICER.—The Commission shall not be subject to the control of any Advisory Committee Management Officer designated under section 8(b)(1) of the Federal Advisory Committee Act (5 U.S.C. App.).

(3) SUBCOMMITTEE.—Any subcommittee of the Commission shall be treated as the Commission for purposes of the Federal Advisory Committee Act (5 U.S.C. App.).

(4) CHARTER.—The enactment of the SCRUB Act of 2015 shall be considered to meet the requirements of the Commission under section 9(c) of the Federal Advisory Committee Act (5 U.S.C. App.).

TITLE II—REGULATORY CUT-GO

SEC. 201. CUT-GO PROCEDURES.

(a) IN GENERAL.—Except as provided in section 101(j)(2)(A) or section 202, an agency, when the agency makes a new rule, shall repeal rules or sets of rules of that agency classified by the Commission under section 101(h)(4)(A)(ii), such that the annual costs of the new rule to the United States economy is offset by such repeals, in an amount equal to or greater than the cost of the new rule, based on the regulatory cost reductions of repeal identified by the Commission.

(b) ALTERNATIVE PROCEDURE.—An agency may, alternatively, repeal rules or sets of rules of that agency classified by the Commission under section 101(h)(4)(A)(ii) prior to the time specified in subsection (a). If the agency so repeals such a rule or set of rules and thereby reduces the annual, inflation-adjusted cost of the rule or set of rules to the United States economy, the agency may thereafter apply the reduction in regulatory costs, based on the regulatory cost reductions of repeal identified by the Commission, to meet, in whole or in part, the regulatory cost reduction required under subsection (a) of this section to be made at the time the agency promulgates a new rule.

(c) ACHIEVEMENT OF FULL NET COST REDUCTIONS.—

(1) IN GENERAL.—Subject to the provisions of paragraph (2), an agency may offset the costs of a new rule or set of rules by repealing a rule or set of rules listed by the Commission under section 101(h)(4)(A)(ii) that implement the same statutory authority as the new rule or set of rules.

(2) LIMITATION.—When using the authority provided in paragraph (1), the agency must achieve a net reduction in costs imposed by the agency's body of rules (including the new rule or set of rules) that is equal to or greater than the cost of the new rule or set of rules to be promulgated, including, whenever necessary, by repealing additional rules of the agency listed by the Commission under section 101(h)(4)(A)(ii).

SEC. 202. APPLICABILITY.

An agency shall no longer be subject to the requirements of sections 201 and 203 beginning on the date that there is no rule or set of rules of the agency classified by the Commission under section 101(h)(4)(A)(ii) that has not been repealed such that all regulatory cost reductions identified by the Commission to be achievable through repeal have been achieved.

SEC. 203. OIRA CERTIFICATION OF COST CALCULATIONS.

The Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget shall review and certify the accuracy of agency determinations of the costs of new rules under section 201. The certification shall be included in the administrative record of the relevant rulemaking by the agency promulgating the rule, and the Administrator shall transmit a copy of the certification to Congress when it transmits the certification to the agency.

TITLE III—RETROSPECTIVE REVIEW OF NEW RULES

SEC. 301. PLAN FOR FUTURE REVIEW.

When an agency makes a rule, the agency shall include in the final issuance of such rule a plan for the review of such rule by not later than 10 years after the date such rule is made. Such a review, in the case of a major rule, shall be substantially similar to the review by the Commission under section 101(h). In the case of a rule other than a major rule, the agency's plan for review shall include other procedures and standards to enable the agency to determine whether to repeal or amend the rule to eliminate unnecessary regulatory costs to the economy. Whenever feasible, the agency shall include a proposed plan for review of a proposed rule in its notice of proposed rulemaking and shall receive public comment on the plan.

TITLE IV—JUDICIAL REVIEW

SEC. 401. JUDICIAL REVIEW.

(a) IMMEDIATE REPEALS.—Agency compliance with section 101(j) of this Act shall be subject to judicial review under chapter 7 of title 5, United States Code.

(b) CUT-GO PROCEDURES.—Agency compliance with title II of this Act shall be subject to judicial review under chapter 7 of title 5, United States Code.

(c) PLANS FOR FUTURE REVIEW.—Agency compliance with section 301 shall be subject to judicial review under chapter 7 of title 5, United States Code.

TITLE V—MISCELLANEOUS PROVISIONS

SEC. 501. DEFINITIONS.

In this Act:

(1) AGENCY.—The term "agency" has the meaning given such term in section 551 of title 5, United States Code.

(2) COMMISSION.—The term "Commission" means the Retrospective Regulatory Review Commission established under section 101.

(3) MAJOR RULE.—The term "major rule" means any rule that the Administrator of the Office of Information and Regulatory Affairs determines is likely to impose—

(A) an annual cost on the economy of $100,000,000 or more, adjusted annually for inflation;

(B) a major increase in costs or prices for consumers, individual industries, Federal, State, local, or tribal government agencies, or geographic regions;

(C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets; or

(D) significant impacts on multiple sectors of the economy.

(4) RULE.—The term "rule" has the meaning given that term in section 551 of title 5, United States Code.

(5) SET OF RULES.—The term "set of rules" means a set of rules that collectively implements a regulatory authority of an agency.

SEC. 502. EFFECTIVE DATE.

This Act and the amendments made by this Act shall take effect beginning on the date of the enactment of this Act.

I

114TH CONGRESS
1ST SESSION

H. R. 1155

To provide for the establishment of a process for the review of rules and sets of rules, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 27, 2015

Mr. SMITH of Missouri (for himself, Mr. COLLINS of Georgia, Mr. HULTGREN, Mr. POE of Texas, Mr. MARINO, Mr. FRANKS of Arizona, Mr. GOODLATTE, and Mr. LUETKEMEYER) introduced the following bill; which was referred to the Committee on Oversight and Government Reform, and in addition to the Committee on the Judiciary, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

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A BILL

To provide for the establishment of a process for the review of rules and sets of rules, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Searching for and Cutting Regulations that are Unnecessarily Burdensome Act of 2015" or as the "SCRUB Act of 2015".

SEC. 2. TABLE OF CONTENTS.

TITLE I—RETROSPECTIVE REGULATORY REVIEW COMMISSION

SEC. 101. IN GENERAL.

(a) ESTABLISHMENT.—There is established a commission, to be known as the "Retrospective Regulatory Review Commission", that shall review rules and sets of rules in accordance with specified criteria to determine if a rule or set of rules should be repealed to eliminate or reduce the costs of regulation to the economy. The Commission shall terminate on the date that is 5 years and 180 days after the date of enactment of this Act or 5 years after the date by which all Commission members' terms have commenced, whichever is later.

(b) MEMBERSHIP.—

(1) NUMBER.—The Commission shall be composed of 9 members who shall be appointed by the President and confirmed by the Senate. Each member shall be appointed not later than 180 days after the date of enactment of this Act.

(2) TERM.—The term of each member shall commence upon the member's confirmation by the Senate and shall extend to the date that is 5 years and 180 days after the date of enactment of this Act or that is 5 years after the date by which all members have been confirmed by the Senate, whichever is later.

(3) APPOINTMENT.—The members of the Commission shall be appointed as follows:

(A) CHAIR.—The President shall appoint as the Chair of the Commission an individual with expertise and experience in rulemaking, such as past Administrators of the Office of Information and Regulatory Affairs, past chairmen of the Administrative Conference of the United States, and other individuals with similar expertise and experience in rulemaking affairs and the administration of regulatory reviews.

(B) CANDIDATE LIST OF MEMBERS.—The Speaker of the House of Representatives, the Minority Leader of the House of Representatives, the Majority Leader of the Senate, and the Minority Leader of the Senate shall each present to the President a list of candidates to be members of the Commission. Such candidates shall be individuals learned in rulemaking affairs and, preferably, administration of regulatory reviews. The President shall appoint 2 members of the Commission from each list provided under this subparagraph, subject to the provisions of subparagraph (C).

(C) RESUBMISSION OF CANDIDATE.—The President may request from the presenter of the list under subparagraph (B) a new list of one or more candidates if the President—

(i) determines that any candidate on the list presented pursuant to subparagraph (B) does not meet the qualifications specified in such subparagraph to be a member of the Commission; and

(ii) certifies that determination to the congressional officials specified in subparagraph (B).

(c) POWERS AND AUTHORITIES OF THE COMMISSION.—

(1) MEETINGS.—The Commission may meet when, where, and as often as the Commission determines appropriate, except that the Commission shall hold public meetings not less than twice each year. All meetings of the Commission shall be open to the public.

(2) HEARINGS.—In addition to meetings held under paragraph (1), the Commission may hold hearings to consider issues of fact or law relevant to the Commission's work. Any hearing held by the Commission shall be open to the public.

(3) ACCESS TO INFORMATION.—The Commission may secure directly from any agency information and documents necessary to enable the Commission to carry out this Act. Upon request of the Chair of the Commission, the head of that agency shall furnish that information or document to the Commission as soon as possible, but not later than two weeks after the date on which the request was made.

(4) SUBPOENAS.—

(A) IN GENERAL.—The Commission may issue subpoenas requiring the attendance and testimony of witnesses and the production of

any evidence relating to the duties of the Commission. The attendance of witnesses and the production of evidence may be required from any place within the United States at any designated place of hearing within the United States.

(B) FAILURE TO OBEY A SUBPOENA.—If a person refuses to obey a subpoena issued under subparagraph (A), the Commission may apply to a United States district court for an order requiring that person to appear before the Commission to give testimony, produce evidence, or both, relating to the matter under investigation. The application may be made within the judicial district where the hearing is conducted or where that person is found, resides, or transacts business. Any failure to obey the order of the court may be punished by the court as civil contempt.

(C) SERVICE OF SUBPOENAS.—The subpoenas of the Commission shall be served in the manner provided for subpoenas issued by a United States district court under the Federal Rules of Civil Procedure for the United States district courts.

(D) SERVICE OF PROCESS.—All process of any court to which application is made under subparagraph (B) may be served in the judicial district in which the person required to be served resides or may be found.

(d) PAY AND TRAVEL EXPENSES.—

(1) PAY.—

(A) MEMBERS.—Each member, other than the Chair of the Commission, shall be paid at a rate equal to the daily equivalent of the minimum annual rate of basic pay payable for level IV of the Executive Schedule under section 5315 of title 5, United States Code, for each day (including travel time) during which the member is engaged in the actual performance of duties vested in the Commission.

(B) CHAIR.—The Chair shall be paid for each day referred to in subparagraph (A) at a rate equal to the daily equivalent of the minimum annual rate of basic pay payable for level III of the Executive Schedule under section 5314 of title 5, United States Code.

(2) TRAVEL EXPENSES.—Members shall receive travel expenses, including per diem in lieu of subsist-

ence, in accordance with sections 5702 and 5703 of title 5, United States Code.

(e) DIRECTOR OF STAFF.—

(1) IN GENERAL.—The Commission shall appoint a Director.

(2) PAY.—The Director shall be paid at the rate of basic pay payable for level V of the Executive Schedule under section 5316 of title 5, United States Code.

(f) STAFF.—

(1) IN GENERAL.—Subject to paragraph (2), the Director, with the approval of the Commission, may appoint, fix the pay of, and terminate additional personnel.

(2) LIMITATIONS ON APPOINTMENT.—The Director may make such appointments without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, and any personnel so appointed may be paid without regard to the provisions of chapter 51 and subchapter III of chapter 53 of that title relating to classification and General Schedule pay rates, except that an individual so appointed may not receive pay in excess of the annual rate of basic pay payable for GS–15 of the General Schedule.

(3) AGENCY ASSISTANCE.—Following consultation with and upon request of the Chair of the Commission, the head of any agency may detail any of the personnel of that agency to the Commission to assist the Commission in carrying out the duties of the Commission under this Act.

(4) GAO AND OIRA ASSISTANCE.—The Comptroller General of the United States and the Administrator of the Office of Information and Regulatory Affairs shall provide assistance, including the detailing of employees, to the Commission in accordance with an agreement entered into with the Commission.

(5) ASSISTANCE FROM OTHER PARTIES.—Congress, the States, municipalities, federally recognized Indian tribes, and local governments may provide assistance, including the detailing of employees, to the Commission in accordance with an agreement entered into with the Commission.

(g) OTHER AUTHORITY.—

(1) EXPERTS AND CONSULTANTS.—The Commission may procure by contract, to the extent funds are available, the temporary or intermittent services of experts or consultants pursuant to section 3109 of title 5, United States Code.

(2) PROPERTY.—The Commission may lease space and acquire personal property to the extent funds are available.

(h) DUTIES OF THE COMMISSION.—

(1) IN GENERAL.—The Commission shall conduct a review of the Code of Federal Regulations to identify rules and sets of rules that collectively implement a regulatory program that should be repealed to lower the cost of regulation to the economy. The Commission shall give priority in the review to rules or sets of rules that are major rules or include major rules, have been in effect more than 15 years, impose paperwork burdens that could be reduced substantially without significantly diminishing regulatory effectiveness, impose disproportionately high costs on entities that qualify as small entities within the meaning of section 601(6) of title 5, United States Code, or could be strengthened in their effectiveness while reducing regulatory costs. The Commission shall have as a goal of the Commission to achieve a reduction of at least 15 percent in the cumulative costs of Federal regulation with a minimal reduction in the overall effectiveness of such regulation.

(2) NATURE OF REVIEW.—To identify which rules and sets of rules should be repealed to lower the cost of regulation to the economy, the Commission shall apply the following criteria:

(A) Whether the original purpose of the rule or set of rules was achieved, and the rule or set of rules could be repealed without significant recurrence of adverse effects or conduct that the rule or set of rules was intended to prevent or reduce.

(B) Whether the implementation, compliance, administration, enforcement or other costs of the rule or set of rules to the economy are not justified by the benefits to society within the United States produced by the expenditure of those costs.

(C) Whether the rule or set of rules has been rendered unnecessary or obsolete, taking into consideration the length of time since the rule was made and the degree to which technology, economic conditions, market practices, or other relevant factors have changed in the subject area affected by the rule or set of rules.

(D) Whether the rule or set of rules is ineffective at achieving the purposes of the rule or set of rules.

(E) Whether the rule or set of rules overlaps, duplicates, or conflicts with other Federal rules, and to the extent feasible, with State and local governmental rules.

(F) Whether the rule or set of rules has excessive compliance costs or is otherwise excessively burdensome, as compared to alternatives that—

(i) specify performance objectives rather than conduct or manners of compliance;

(ii) establish economic incentives to encourage desired behavior;

(iii) provide information upon which choices can be made by the public;

(iv) incorporate other innovative alternatives rather than agency actions that specify conduct or manners of compliance; or

(v) could in other ways substantially lower costs without significantly undermining effectiveness.

(G) Whether the rule or set of rules inhibits innovation in or growth of the United States economy, such as by impeding the introduction or use of safer or equally safe technology that is newer or more efficient than technology required by or permissible under the rule or set of rules.

(H) Whether or not the rule or set of rules harms competition within the United States economy or the international economic competitiveness of enterprises or entities based in the United States.

(I) Such other criteria as the Commission devises to identify rules and sets of rules that can be repealed to eliminate or reduce unnecessarily burdensome costs to the United States economy.

(3) METHODOLOGY FOR REVIEW.—The Commission shall establish a methodology for conducting the review (including an overall review and discrete reviews of portions of the Code of Federal Regulations), identifying rules and sets of rules, and classifying rules under this subsection and publish the terms of the methodology in the Federal Register and on the website of the Commission. The

Commission may propose and seek public comment on the methodology before the methodology is established.

(4) CLASSIFICATION OF RULES AND SETS OF RULES.—

(A) IN GENERAL.—After completion of any review of rules or sets of rules under paragraph (2), the Commission shall classify each rule or set of rules identified in the review to qualify for recommended repeal as either a rule or set of rules—

(i) on which immediate action to repeal is recommended; or

(ii) that should be eligible for repeal under regulatory cut-go procedures under title II.

(B) DECISIONS BY MAJORITY.—Each decision by the Commission to identify a rule or set of rules for classification under this paragraph, and each decision whether to classify the rule or set of rules under clause (i) or (ii) of subparagraph (A), shall be made by a simple majority vote of the Commission. No such vote shall take place until after all members of the Commission have been confirmed by the Senate.

(5) INITIATION OF REVIEW BY OTHER PERSONS.—

(A) IN GENERAL.—The Commission may also conduct a review under paragraph (2) of, and, if appropriate, classify under paragraph (4), any rule or set of rules that is submitted for review to the Commission by—

(i) the President;

(ii) a Member of Congress;

(iii) any officer or employee of a Federal, State, local or tribal government, or regional governmental body; or

(iv) any member of the public.

(B) FORM OF SUBMISSION.—A submission to the Commission under this paragraph shall—

(i) identify the specific rule or set of rules submitted for review;

(ii) provide a statement of evidence to demonstrate that the rule or set of rules qualifies to be identified for repeal under the criteria listed in paragraph (2); and

(iii) such other information as the submitter believes may be helpful to the Commission's review, including a state-

ment of the submitter's interest in the matter.

(C) PUBLIC AVAILABILITY.—The Commission shall make each submission received under this paragraph available on the website of the Commission as soon as possible, but not later than 1 week after the date on which the submission was received.

(i) NOTICES AND REPORTS OF THE COMMISSION.—

(1) NOTICES OF AND REPORTS ON ACTIVITIES.—The Commission shall publish, in the Federal Register and on the website of the Commission—

(A) notices in advance of all public meetings, hearings, and classifications under subsection (h) informing the public of the basis, purpose, and procedures for the meeting, hearing, or classification; and

(B) reports after the conclusion of any public meeting, hearing, or classification under subsection (h) summarizing in detail the basis, purpose, and substance of the meeting, hearing, or classification.

(2) ANNUAL REPORTS TO CONGRESS.—Each year, beginning on the date that is one year after the date on which all Commission members have

been confirmed by the Senate, the Commission shall submit a report simultaneously to each House of Congress detailing the activities of the Commission for the previous year, and listing all rules and sets of rules classified under subsection (h) during that year. For each rule or set of rules so listed, the Commission shall—

(A) identify the agency that made the rule or set of rules;

(B) identify the annual cost of the rule or set of rules to the United States economy and the basis upon which the Commission identified that cost;

(C) identify whether the rule or set of rules was classified under clause (i) or clause (ii) of subsection (h)(4)(A);

(D) identify the criteria under subsection (h)(2) that caused the classification of the rule or set of rules and the basis upon which the Commission determined that those criteria were met;

(E) for each rule or set of rules listed under the criteria set forth in subparagraphs (B), (D), (F), (G), or (H) of subsection (h)(2), or other criteria established by the Commission

under subparagraph (I) of such subsection under which the Commission evaluated alternatives to the rule or set of rules that could lead to lower regulatory costs, identify alternatives to the rule or set of rules that the Commission recommends the agency consider as replacements for the rule or set of rules and the basis on which the Commission rests the recommendations, and, in identifying such alternatives, emphasize alternatives that will achieve regulatory effectiveness at the lowest cost and with the lowest adverse impacts on jobs;

(F) for each rule or set of rules listed under the criteria set forth in subsection (h)(2)(E), the other Federal, State, or local governmental rules that the Commission found the rule or set of rules to overlap, duplicate, or conflict with, and the basis for the findings of the Commission; and

(G) in the case of each set of rules so listed, analyze whether Congress should also consider repeal of the statutory authority implemented by the set of rules.

(3) FINAL REPORT.—Not later than the date on which the Commission members' appointments

expire, the Commission shall submit a final report simultaneously to each House of Congress summarizing all activities and recommendations of the Commission, including a list of all rules or sets of rules the Commission classified under clause (i) of subsection (h)(4)(A) for immediate action to repeal, a separate list of all rules or sets of rules the Commission classified under clause (ii) of subsection (h)(4)(A) for repeal, and with regard to each rule or set of rules listed on either list, the information described in subparagraphs (A) through (F) of subsection (h)(2). This report may be included in the final annual report of the Commission under paragraph (2) and may include the Commission's recommendation whether the Commission should be reauthorized by Congress.

(j) REPEAL OF REGULATIONS; CONGRESSIONAL CONSIDERATION OF COMMISSION REPORTS.—

(1) IN GENERAL.—Subject to paragraph (2)—

(A) the head of each agency with authority to repeal a rule or set of rules classified by the Commission under subsection (h)(4)(A)(i) for immediate action to repeal and newly listed as such in an annual or final report of the Commission under paragraph (2) or (3) of sub-

section (i) shall repeal the rule or set of rules as recommended by the Commission within 60 days after the enactment of a joint resolution under paragraph (2) for approval of the recommendations of the Commission in the report; and

(B) the head of each agency with authority to repeal a rule or set of rules classified by the Commission under subsection (h)(4)(A)(ii) for repeal and newly listed as such in an annual or final report of the Commission under paragraph (2) or (3) of subsection (i) shall repeal the rule or set of rules as recommended by the Commission pursuant to section 201, following the enactment of a joint resolution under paragraph (2) for approval of the recommendations of the Commission in the report.

(2) CONGRESSIONAL APPROVAL.—

(A) IN GENERAL.—No head of an agency described in paragraph (1) shall be required by this Act to carry out a repeal listed by the Commission in a report transmitted to Congress under paragraph (2) or (3) of subsection (i) until a joint resolution is enacted, in accordance with the provisions of subparagraph (B), ap-

proving such recommendations of the Commission for repeal.

(B) TERMS OF THE RESOLUTION.—For purposes of paragraph (A), the term "joint resolution" means only a joint resolution which is introduced after the date on which the Commission transmits to the Congress under paragraph (2) or (3) of subsection (i) the report containing the recommendations to which the resolution pertains, and—

(i) which does not have a preamble;

(ii) the matter after the resolving clause of which is only as follows: "That Congress approves the recommendations for repeal of the Retrospective Regulatory Review Commission as submitted by the Commission on _____", the blank space being filled in with the appropriate date; and

(iii) the title of which is as follows: "Approving recommendations for repeal of the Retrospective Regulatory Review Commission.".

(3) REISSUANCE OF RULES.—

(A) NO SUBSTANTIALLY SIMILAR RULE TO BE REISSUED.—A rule that is repealed under paragraph (1) or section 201 may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution approving the Commission's recommendation to repeal the original rule.

(B) AGENCY TO ENSURE AVOIDANCE OF SIMILAR DEFECTS.—An agency, in making any new rule to implement statutory authority previously implemented by a rule repealed under paragraph (1) or section 201, shall ensure that the new rule does not result in the same adverse effects of the repealed rule that caused the Commission to recommend to Congress the latter's repeal and will not result in new adverse effects of the kind described in the criteria specified in or under subsection (h).

(k) AUTHORIZATION OF APPROPRIATIONS.—

(1) IN GENERAL.—There are authorized to be appropriated such sums as may be necessary to the

Commission to carry out this Act, not to exceed $30,000,000.

(2) AVAILABILITY.—Any sums appropriated under the authorization contained in this section shall remain available, without fiscal year limitation, until the earlier of the date that such sums are expended or the date of the termination of the Commission.

(l) WEBSITE.—

(1) IN GENERAL.—The Commission shall establish a public website that—

(A) uses current information technology to make records available on the website;

(B) provides information in a standard data format; and

(C) receives and publishes public comments.

(2) PUBLISHING OF INFORMATION.—Any information required to be made available on the website established pursuant to this Act shall be published in a timely manner and shall be accessible by the public on the website at no cost.

(3) RECORD OF PUBLIC MEETINGS AND HEARINGS.—All records of public meetings and hearings shall be published on the website as soon as possible,

but not later than 1 week after the date on which such public meeting or hearing occurred.

(4) PUBLIC COMMENTS.—The Commission shall publish on the website all public comments and submissions.

(5) NOTICES.—The Commission shall publish on the website notices of all public meetings and hearings at least one week before the date on which such public meeting or hearing occurs.

(m) APPLICABILITY OF THE FEDERAL ADVISORY COMMITTEE ACT.—

(1) IN GENERAL.—Except as otherwise provided in this Act, the Commission shall be subject to the provisions of the Federal Advisory Committee Act (5 U.S.C. App.).

(2) ADVISORY COMMITTEE MANAGEMENT OFFICER.—The Commission shall not be subject to the control of any Advisory Committee Management Officer designated under section 8(b)(1) of the Federal Advisory Committee Act (5 U.S.C. App.).

(3) SUBCOMMITTEE.—Any subcommittee of the Commission shall be treated as the Commission for purposes of the Federal Advisory Committee Act (5 U.S.C. App.).

(4) CHARTER.—The enactment of the SCRUB Act of 2015 shall be considered to meet the requirements of the Commission under section 9(c) of the Federal Advisory Committee Act (5 U.S.C. App.).

TITLE II—REGULATORY CUT-GO

SEC. 201. CUT-GO PROCEDURES.

(a) IN GENERAL.—Except as provided in section 101(j)(2)(A) or section 202, an agency, when the agency makes a new rule, shall repeal rules or sets of rules of that agency classified by the Commission under section 101(h)(4)(A)(ii), such that the annual costs of the new rule to the United States economy is offset by such repeals, in an amount equal to or greater than the cost of the new rule, based on the regulatory cost reductions of repeal identified by the Commission.

(b) ALTERNATIVE PROCEDURE.—An agency may, alternatively, repeal rules or sets of rules of that agency classified by the Commission under section 101(h)(4)(A)(ii) prior to the time specified in subsection (a). If the agency so repeals such a rule or set of rules and thereby reduces the annual, inflation-adjusted cost of the rule or set of rules to the United States economy, the agency may thereafter apply the reduction in regulatory costs, based on the regulatory cost reductions of repeal identified by the Commission, to meet, in whole or in part,

the regulatory cost reduction required under subsection (a) of this section to be made at the time the agency promulgates a new rule.

(c) ACHIEVEMENT OF FULL NET COST REDUCTIONS.—

(1) IN GENERAL.—Subject to the provisions of paragraph (2), an agency may offset the costs of a new rule or set of rules by repealing a rule or set of rules listed by the Commission under section 101(h)(4)(A)(ii) that implement the same statutory authority as the new rule or set of rules.

(2) LIMITATION.—When using the authority provided in paragraph (1), the agency must achieve a net reduction in costs imposed by the agency's body of rules (including the new rule or set of rules) that is equal to or greater than the cost of the new rule or set of rules to be promulgated, including, whenever necessary, by repealing additional rules of the agency listed by the Commission under section 101(h)(4)(A)(ii).

SEC. 202. APPLICABILITY.

An agency shall no longer be subject to the requirements of sections 201 and 203 beginning on the date that there is no rule or set of rules of the agency classified by the Commission under section 101(h)(4)(A)(ii) that has

not been repealed such that all regulatory cost reductions identified by the Commission to be achievable through repeal have been achieved.

SEC. 203. OIRA CERTIFICATION OF COST CALCULATIONS.

The Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget shall review and certify the accuracy of agency determinations of the costs of new rules under section 201. The certification shall be included in the administrative record of the relevant rulemaking by the agency promulgating the rule, and the Administrator shall transmit a copy of the certification to Congress when it transmits the certification to the agency.

TITLE III—RETROSPECTIVE REVIEW OF NEW RULES

SEC. 301. PLAN FOR FUTURE REVIEW.

When an agency makes a rule, the agency shall include in the final issuance of such rule a plan for the review of such rule by not later than 10 years after the date such rule is made. Such a review, in the case of a major rule, shall be substantially similar to the review by the Commission under section 101(h). In the case of a rule other than a major rule, the agency's plan for review shall include other procedures and standards to enable the agency to determine whether to repeal or amend the rule

to eliminate unnecessary regulatory costs to the economy. Whenever feasible, the agency shall include a proposed plan for review of a proposed rule in its notice of proposed rulemaking and shall receive public comment on the plan.

TITLE IV—JUDICIAL REVIEW

SEC. 401. JUDICIAL REVIEW.

(a) IMMEDIATE REPEALS.—Agency compliance with section 101(j) of this Act shall be subject to judicial review under chapter 7 of title 5, United States Code.

(b) CUT-GO PROCEDURES.—Agency compliance with title II of this Act shall be subject to judicial review under chapter 7 of title 5, United States Code.

(c) PLANS FOR FUTURE REVIEW.—Agency compliance with section 301 shall be subject to judicial review under chapter 7 of title 5, United States Code.

TITLE V—MISCELLANEOUS PROVISIONS

SEC. 501. DEFINITIONS.

In this Act:

(1) AGENCY.—The term "agency" has the meaning given such term in section 551 of title 5, United States Code.

(2) COMMISSION.—The term "Commission" means the Retrospective Regulatory Review Commission established under section 101.

(3) MAJOR RULE.—The term "major rule" means any rule that the Administrator of the Office of Information and Regulatory Affairs determines is likely to impose—

(A) an annual cost on the economy of $100,000,000 or more, adjusted annually for inflation;

(B) a major increase in costs or prices for consumers, individual industries, Federal, State, local, or tribal government agencies, or geographic regions;

(C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets; or

(D) significant impacts on multiple sectors of the economy.

(4) RULE.—The term "rule" has the meaning given that term in section 551 of title 5, United States Code.

(5) SET OF RULES.—The term "set of rules" means a set of rules that collectively implements a regulatory authority of an agency.

SEC. 502. EFFECTIVE DATE.

This Act and the amendments made by this Act shall take effect beginning on the date of the enactment of this Act.

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